

7-8-2014

Posaid v. State Outfitters and Guides Licensing Bd. Clerk's Record v. 4 Dckt. 41397

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In the Supreme Court of the State of Idaho

A.T. "SANDY" PODSAID,

Petitioner-Appellant,

v.

STATE OF IDAHO OUTFITTERS AND
GUIDES LICENSING BOARD, a State agency,

Respondent.

LAW CLERK

ORDER GRANTING APPELLANT'S
MOTION TO AUGMENT THE RECORD

Supreme Court Docket Nos. 41397-2013
(41398-2013)
Shoshone County Nos. 2008-807
(2009-440)

APPELLANT'S MOTION TO AUGMENT THE RECORD with attachments was filed by counsel for Appellant on July 7, 2014, requesting this Court to augment the Clerk's Record on Appeal to include the transcript and briefs set forth in this Motion. Further, counsel for Appellant submitted a check in the amount of \$266.00 along with this Motion. Therefore,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED; however, it shall be noted that the transcript listed below was previously received by this Court on March 17, 2014, as an EXHIBIT to this Record on Appeal:

1. Hearing Transcript regarding Guide Application of A.T. "Sandy" Podsaid, filed June 17, 2009. (Page No. AR-1 – AR-30)

IT FURTHER IS ORDERED that the Clerk's Record in this appeal shall be augmented to include the items listed below, copies of which were attached to Appellant's Motion:

Shoshone County Case No. CV-2008-807:

1. Opening Brief, filed January 14, 2013; (Page No. AR-31 – AR-53)
2. Respondent's Brief, filed February 15, 2013; (Page No. AR-54 – AR-61) and
3. Reply Brief, filed March 29, 2013. (Page No. AR-62 – AR-79)

Shoshone County Case No. CV-2009-440:

1. Opening Brief filed January 14, 2013; (Page No. AR-80 – AR-101)
2. Respondent's Brief, filed February 15, 2013; (Page No. AR-102 – AR-111) and
3. Reply Brief, filed March 29, 2013. (Page No. AR-112 – AR-133)

IT FURTHER IS ORDERED that the due date for the filing of RESPONDENT'S BRIEF with this Court shall remain as previously set for August 4, 2014.

DATED this 8th day of July, 2014.

For the Supreme Court

AUGMENTATION RECORD

Stephen W. Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record

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**A.T. "SANDY" PODSAID v. STATE OF IDAHO OUTFITTERS AND GUIDES
LICENSING BOARD**

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COPY

BEFORE THE STATE OF IDAHO
OUTFITTERS AND GUIDES LICENSING BOARD

RE:)
)
HEARING REGARDING GUIDE)
APPLICATION OF)
A. T. "SANDY" PODSAID.)
)

HEARING BEFORE

MEMBER WAYNE HUNSUCKER (CHAIRMAN)
MEMBER LOUISE STARK
MEMBER CHRIS KORELL
MEMBER TOM LONG
MEMBER ALEX IRBY

ALSO PRESENT

OFFICE SUPERVISOR LORI THOMASON
BOARD ATTORNEY ROGER HALES
BOARD PROSECUTOR MIKE KANE

PLACE: Idaho Outfitters and Guides Licensing Board
1365 North Orchard
Boise, Idaho

DATE: June 17, 2009



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1 BOISE, IDAHO, WEDNESDAY, JUNE 17, 2009, 1:30 P.M.

2
3
4 (Disc No. 1.)

5 A VOICE: It's a-working.

6 MR. HALES: Okay. So let's go on the record.

7 I think now is the time and place set for the
8 hearing concerning the matter of the guide license of A. T.
9 "Sandy" Podsaid.

10 Present today is Mike Kane on behalf of the
11 State, slash, staff.

12 And a check out call, presently Mr. Podsaid has
13 not appeared for this hearing and it's my understanding he did
14 receive notice. I believe that Mr. Kane will go into it, but
15 we have received a letter from Podsaid's attorney, Susan Weeks,
16 which reviews various concerns about the procedure, but
17 ultimately ends up providing the Board notice that Mr. Podsaid
18 nor Ms. Weeks intended to appear at this hearing today.

19 And so, with that, I think Mr. Chair, it's
20 appropriate for the Board to listen to Mr. Kane and his
21 presentation, and let the hearing proceed.

22 CHAIRMAN HUNSUCKER: Okay.

23 MR. KANE: Thank you, Mr. Chairman. I want to go
24 somewhat slow today, and I want to walk you through some
25 things. And maybe the first thing we ought to talk about is

1 the process: What -- what are we doing here, where -- what is
2 the end game as far as today, and then what can kind of happen
3 from here. And before you is the guide license application of
4 A. T. Sandy Podsaid, and this is on the outfitter license of a
5 gentleman named Boulanger, if I'm pronouncing that right, Scott
6 Boulanger. And I want you to know, first of all, that not only
7 has Mr. Podsaid been told about this matter today, but so has
8 Mr. Boulanger. We've also copied him on the various documents
9 that we're going to be talking about today.

10 Now, to kind of back up a little bit here, we've
11 talked about a letter from Susan Weeks which came faxed
12 yesterday, dated June 15, 2009, and in it, it says, among other
13 things, that Mr. Podsaid is not going to be here today. And so
14 I think we, if we haven't officially made it part of the
15 record, I would ask that it be made part of the record. And
16 whether that's stamped as an exhibit or not, I'm not sure, but
17 it needs to be made.

18 MR. HALES: I think we'd mark it as an exhibit,
19 produce it as such into the record. And so I'm going to mark
20 that Exhibit A.

21 (Exhibit A was marked for identification.)

22 MR. KANE: All right. Now, I guess what I want
23 to tell you about Exhibit A is there are some things in here
24 that I think bear talking about. Under your statutory
25 mandates, whenever you get a new application or an old

1 application -- I think I'll say this right -- an application as
2 to guiding, whether it's a new application or a continuing one,
3 you've got a limited period of time to take a look at -- at
4 that, and that's 90 days. And so in the beginning of this
5 letter on the first page, you may notice an allegation brought
6 by Susan Weeks down on the very last paragraph wherein she
7 acknowledges that the 90-day period has come and gone because
8 of an application that came in on December 11, 2008. Let me
9 explain what that's about.

10 In fact, on December 12th of 2008, the Board did
11 receive a guide license application for Sandy Podsaid, again
12 under Mr. Boulanger's outfitter license. As I understand it,
13 what happened at that time, the fee did not accompany it.

14 Shortly thereafter, there was another document
15 dated January 9, 2009, which should probably have been
16 submitted at the time of the guide license application, would
17 show that there was -- there's an Affidavit here saying that
18 Sandy Podsaid has a good ability to snowmobile. Well, that
19 didn't accompany the original one. So that came in on January
20 9th.

21 And then on February 23rd, a letter came from
22 Mr. Boulanger that said: To Whom It May Concern, I would like
23 to withdraw the guide license application for Sandy Podsaid.
24 We are finishing up our lion and hunting clients and will no
25 longer be needing -- needing his help. Thank you.

1 So, for all practical purposes, there was no more
2 application.

3 A VOICE: What was the date of that letter?

4 MR. KANE: The date of that letter was February
5 23rd, 2009. That's when it was received from the Board -- by
6 the Board.

7 I take that back. It looks like February 25th.
8 It's kind of hard to read. In any event, it was within the
9 90-day window starting on December 11th. So for all practical
10 purposes, that stopped any application pertaining to
11 Mr. Podsaid as of February 25th of 2009.

12 A VOICE: And no fee was ever submitted?

13 MR. KANE: My understanding is -- I don't know,
14 but I can find out. I don't think so. I don't think so.

15 So, in any event, that stopped. So the
16 allegation that we've blown the 90-day deadline I don't think
17 is an appropriate one. And I would like to make this part of
18 the record too in this meeting, the original December 12th
19 application, the January 9th document, and the letter of
20 February 25th.

21 A VOICE: So do we have a active application from
22 Sandy Podsaid?

23 MR. KANE: Yes.

24 A VOICE: So now we do.

25 MR. KANE: Yes.

1 A VOICE: Okay.

2 MR. KANE: That's sort of my next link of the
3 chain here.

4 A VOICE: Okay.

5 MR. KANE: On March 30th --

6 MR. HALES: Mike, I'm going to mark that as
7 Exhibit B.

8 (Exhibit B was marked for identification.)

9 MR. KANE: On March 30th of 2009, another
10 application came in involving Mr. Podsaid and Mr. Boulanger,
11 again the same application really as the one in December. So
12 that was received by the Board on March 30, 2009.

13 And you have this before you as part of your
14 packet, which I'm assuming will be the record in this matter.
15 Am I right? Because, otherwise, I can have these one at a
16 time.

17 MR. HALES: Well, I don't -- I don't want to go
18 through the one-at-a-time approach, to be honest with you.

19 MR. KANE: Uh-huh.

20 MR. HALES: I think it would be appropriate if --
21 if we made an exhibit the full set of documents which are
22 listed 1 through 19 and include a index on the front, and I
23 think it would be appropriate if we just -- if you move to
24 admit these as one exhibit.

25 MR. KANE: I would so move.

1 MR. HALES: Okay.

2 MR. KANE: Or, so offer those exhibits, excuse
3 me. They do the motions, I guess.

4 MR. HALES: And so, Mr. Chair, I think it's
5 appropriate -- I'm not sure that we're formally admitting these
6 into evidence, but I think it's appropriate that we do so at
7 this point.

8 CHAIRMAN HUNSUCKER: I think that's correct. And
9 just for the recorded record, would you state what the
10 application -- what activities were on the application that
11 they were applying for?

12 MR. KANE: Yes. This, of course, is the first of
13 many exhibits, but the activities --

14 A VOICE: The activities are with the --

15 A VOICE: The activities are page 2 of two, at
16 the top.

17 A VOICE: Here we go.

18 MR. KANE: Oh, I'm sorry. Hunting, recreation,
19 snowmobiling.

20 A VOICE: Louise saved us again.

21 MR. KANE: Yes. Okay. So this is Exhibit C.

22 MR. HALES: Yes. And just for the record so that
23 we're clear, Exhibit C will consist of documents numbered 1
24 through 19, and they start with the guide license application
25 for Mr. A. T. Sandy Podsaid, and they end with an Order,

1 reference Case No. 07-2594-06.

2 (Exhibit C was marked for identification.)

3 MR. KANE: Now, what's important to understand
4 about the March 30th application is that also did not include a
5 fee. So it was a few days later -- and my recollection is
6 April 9th -- before the fee got there. But in either event,
7 whether it's March 30th or April 9th or whenever the
8 application is considered to be in play, we're certainly within
9 our 90-day window. So I believe we're good on the law.

10 Okay. Now, there is other stuff you need to
11 know. First of all, we -- you recall in December we had a
12 board meeting and Mr. Podsaid was here, and the issue at that
13 time is when did his license expire. Was it the end of
14 December or was it the end of March of '09. And the Board at
15 that time ruled that it was the end of December.

16 That Decision was appealed, and that appeal went
17 up to the District Court in Shoshone County. The judge stayed
18 your action at that time, and for all practical purposes
19 allowed Mr. Podsaid to continue guiding until March 30th of
20 2009.

21 The reason I mentioned this portion of the matter
22 is that the first paragraph of Ms. Weeks' letter refers to
23 that, and she makes a statement here which I disagree with and
24 I think I ought to put on the record. It's on her I think
25 fourth line: As you are aware, Judge Gibler entered a

1 temporary stay in Shoshone County, Case No. CV-08-807, which
2 stayed the Board's determination that Mr. Podsaid's license
3 terminated effective December 31, 2008.

4 Now, I agree with that, no question about that.

5 But then she says: And requiring all future
6 licensing requests by Mr. Podsaid to be treated as a new
7 license application.

8 The judge did not speak to that last clause at
9 all in staying the proceedings. I don't know what she's
10 referring to. The Board never spoke to how you're going to
11 treat new applications or continuing applications at the time
12 in December. The Court never spoke to it. It's not what's at
13 issue before the Court. So, I just want to make a record that
14 I've gone back, I've researched my own case, and I find nothing
15 that the Court has ordered you to do anything about how to
16 treat future applications.

17 Now -- so that's important, because I don't want
18 you to have the impression that the District Court has any
19 jurisdiction over what you're doing today. I don't believe the
20 court does have jurisdiction over what you're doing today,
21 despite their potential arguments. So that's something I
22 wanted to at least bring up.

23 Okay, the next thing you need to be aware of, and
24 it's actually in the packet that -- that Roger has, is the
25 issue of a filing that came out of the Board in February of

1 2009, and that was a Complaint that was put together because of
2 the belief that Mr. Podsaid was representing himself as an
3 outfitter, holding himself out to the public as an outfitter.
4 And that was an actual formal disciplinary Complaint, and there
5 was an Answer to that Complaint. We've given that to you not
6 because we're going to argue the case today, but because we
7 wanted to put you on notice that we had put Mr. Podsaid on
8 notice that we had seen his Web site and it appeared, to us, as
9 if he were violating the rules of the Board. So we thought
10 that was important. It gave him notice back in February that
11 we had seen his Web site. This is important because he made
12 some changes which we'll be talking about here in a bit. But
13 that's the reason that we've -- we have that before you. It's
14 not that we're going to be arguing that case today, it's be --
15 which they seem to be thinking that's what we're doing here in
16 their letter, Ms. Weeks' letter. That's not what we're here
17 for. We're here instead to look at this application

18 The law on your application process is this: You
19 have an application. You review it. You then make a
20 determination shall we grant this license or not. If the
21 answer is, no, we're not going to grant the license, then the
22 person who has been denied the license has 21 days to ask for a
23 hearing. Okay.

24 So where you are is step one of that process.
25 You are now looking at the license. What you have done is

1 you've invited Mr. Podsaid to appear, and you've told him
2 you're going to be looking at his license. And when you did
3 that, you issued a Notice of Hearing. And that Notice of
4 Hearing is four pages -- well, three pages long, and it was
5 issued to Mr. Podsaid on April 30th of 2009, and a copy was
6 also sent to Mr. Boulanger. And what that Notice of Hearing
7 says is We're going to be looking at your application as of --
8 on June 17th at 1:30. Okay. So there's no question that we
9 notified Mr. Podsaid about what we're going to be doing today.
10 Now, that is not to be confabulated with the hearing that's 21
11 days from the denial; it just gives him notice that you're
12 going to be looking at his application. That was the idea of
13 doing it this way. And we told him what the law was and what
14 the general -- what his rights were.

15 Now, do I need to make this an exhibit, because
16 I, if I do, I've got it, or I'm not sure if it's part of the
17 record already.

18 MR. HALES: Let's just make it an exhibit.

19 MR. KANE: Okay. Do you have a copy there?

20 MR. HALES: I do.

21 MR. KANE: Great.

22 MR. HALES: So I'm going to make this Notice of
23 Hearing Exhibit D.

24 (Exhibit D was marked for identification.)

25 MR. KANE: Okay, the next thing that happened is

1 we actually filed a Memorandum regarding the Applicant's
2 Internet advertising, which we also sent to Mr. Podsaid. And
3 that's a multiple-page document, but that is dated May 7, 2009,
4 and again a copy goes to Mr. Boulanger, goes to Mr. Podsaid.
5 And this is really the crux of what I'm going to be talking
6 about today, but we want to make sure that everybody knows that
7 Mr. Podsaid has this document. Okay.

8 So the question that's sort of out there is when
9 we're looking at Mr. Podsaid's March 30th application -- March
10 30th of 2009 -- is that a new application or is that a
11 continuing application. And the reason that's important is
12 that the rules are somewhat different.

13 (Sounds.)

14 A VOICE: Louise, your stomach's growling.

15 MR. KANE: The rules are somewhat different.
16 Generally, to kind of state the rules, if it's a continuing
17 application, let's say less scrutiny goes into it, and
18 certainly you can't talk about things that have already been
19 decided and they're over, like, for example, all of the things
20 that happened with Mr. Podsaid back in 2006, 2007, 2008. He's
21 already paid his price for that would be his argument. I'll
22 talk about what those things are in a minute. But having said
23 that, you certainly can, even in a continuing application
24 situation, talk about new violations that are ongoing like the
25 Internet stuff. So that's why I'm giving you this -- this

1 memo.

2 The other way to look at this would be is it a
3 new application. If it's a new application, everything in the
4 person's history is fair game, like the stuff from 2006, 2007,
5 2008.

6 So the question that's sort of before you is how
7 do you look at it? How do you treat it? And you'll have to be
8 guided by your counsel on this, but my argument to you is that
9 it should be treated as a new application because you have a
10 break in time between the time period that he was told he's not
11 guiding by this Board; but more importantly, it's a different
12 kind of guiding from the kind of guiding he was doing before,
13 and it's a different outfitter that he's working for. We'll
14 get more into this as we kind of work our way through it.

15 Having said that, either way you look at it, I
16 believe you're entitled to look at his violation of the Board
17 rules as far as Internet advertising, so either way you look at
18 it.

19 So let's then, with that, it's probably time to
20 actually get to what the facts are, as I understand them to be,
21 and that's where the analysis with the index that you have
22 becomes relevant, because what it does is it lays out a history
23 to the Board of Mr. Podsaid's various dealings. Now, there was
24 an analysis and recommendation for Board agenda items --

25 (Disc No. 2.)

1 MR. KANE: -- of Mr. Podsaid's various dealings.
2 Now, there was an analysis and recommendation for Board agenda
3 items that was put together, and it's sort of a way to walk you
4 through everything. And could we have this marked as an
5 exhibit? It's called Analysis and Recommendation for Board
6 Activities. Do you have that?

7 MR. HALES: I have it.

8 MR. KANE: Okay.

9 MR. HALES: You'd like to mark that as --

10 MR. KANE: Yeah, this would be my -- essentially
11 my written statement to you as to what the case is about.

12 MR. HALES: Okay. We'll mark that as
13 Exhibit E.

14 (Exhibit E was marked for identification.)

15 MR. KANE: And for the record, I am recommending
16 that you deny the license. Now, you will have the opportunity
17 to review this in executive session, so let me kind of skim
18 over the general areas here.

19 It begins in 2006 where Mr. Podsaid is proposing
20 to sell his business called A-W Outfitters to Mr. Randall
21 Parks, and at that time there was -- and this was before my
22 time, actually, but there was some dilemma about who actually
23 was going to be entitled to the outfitter's license, and
24 ultimately it was determined that it would be Mr. Parks and not
25 Mr. Podsaid.

1 Shortly on the heels of that came a disciplinary
2 matter -- you'll find this on page 2 of your document --
3 involving failure to pay a veterinarian, an equine hospital,
4 and Mr. Podsaid was ultimately found to be in violation at that
5 time.

6 Shortly after that came a November 2006 hearing
7 involving Internet advertising. And this is important because
8 at that time, some statements were made about what Mr. Podsaid
9 was going to do or not do about his Web site, and we are going
10 to be speaking more to that in a minute. In any event, he was
11 found at that time to have been in viola- -- in violation, but
12 that was subsequently dismissed as part of later negotiations
13 in 2007.

14 So in May of 2007 there's a new administrative
15 Complaint listing various potential violations, which resulted
16 in an August 2007 Consent Decree Settlement Agreement. And
17 that was the Agreement that, among many other things, said As
18 of December 31, 2008, you're no longer guiding. So, again, you
19 can kind of review that on your own.

20 You met in June 2008 to extend that time period
21 because the original Agreement only spoke in terms I think of
22 October of 2007, at which time he was supposed to sell his
23 business. But ultimately you extended that in June of '08 to
24 December, and ultimately said that's it, December, that --
25 you're done.

1 So that's sort of the history of Mr. Podsaid, but
2 let's get to the Internet stuff. Now, do you all have the memo
3 on the Internet advertising, because I've got attached to that
4 his actual Web site.

5 A VOICE: We're looking at it right now too.

6 MR. KANE: You have that?

7 A VOICE: We're looking at it online.

8 MR. KANE: Now, the one you're looking at online
9 is a little bit different --

10 A VOICE: Right.

11 MR. KANE: -- than this one.

12 MR. HALES: Yeah, let's make sure that you have
13 them look at the one that Mike's reviewing.

14 MR. KANE: Now, I don't want to beat this horse
15 too heavily, but it is my opinion and I argue to you that
16 Mr. Podsaid, for all practical purposes, is hold- -- at this
17 time -- and this is now April of '09 -- is holding himself out
18 as an outfitter where he is neither guiding under your license
19 or outfitting under your license. And you'll see I do a
20 statement of kind of what the law is in the very beginning
21 about what your responsibilities are to look after the public,
22 but if you look on page 6 of my memo, you'll see I quote here
23 some of the things he's doing where he says -- the Web site
24 states: I offer big game hunting. I will work hard to make it
25 happen.

1 And what's probably most important about this is
2 his Web site address is A-W Outfitters. A-W Outfitters is the
3 business that he had sold to Park (sic), Mr. Park. So he -- by
4 2009, the business A-W Outfitters is long sold, and yet he's
5 still holding himself out as A-W Outfitters.

6 A VOICE: As point of clarification, the document
7 that we are looking at, AW Adventures Institute is the title
8 page. You're talking about his w-w-w-a-w outfitter, dot, com
9 address.

10 MR. KANE: Yes.

11 A VOICE: You're saying the address is what it
12 used to be --

13 A VOICE: That hasn't changed.

14 A VOICE: -- that hasn't changed, but the page --

15 A VOICE: It hasn't changed. As of today, it
16 hasn't changed.

17 A VOICE: Okay.

18 MR. KANE: Yes.

19 A VOICE: But you're not -- but the Web site is
20 this current Web site that we're looking at.

21 MR. KANE: Yes. And let me make it clear.
22 You're exactly right. Because the Web site has emblazoned
23 AW Adventures, you're exactly right, but the Web site link, the
24 domain name --

25 A VOICE: Domain name.

1 MR. KANE: -- for lack of a better term, is a-w,
2 hyphen, outfitters. And we believe that's misleading to the
3 public.

4 And then he goes on to describe the various kind
5 of things that -- in the Web site that he can do, and he's
6 offering things like wall tent camps and separate dining tents
7 and great food adventures. He's talking about Idaho big bull
8 elk and deer hunting in the Bitterroot. He talks about an 80
9 to 90 percent success rate. And if you would, he has a section
10 that says: If you would like to send us a little information
11 about yourself and the type of hunting you are interested in
12 learning about, when we talk, we will have a good idea of your
13 needs.

14 Generally what he's doing, I believe, is holding
15 himself out as an outfitter. Contact AW Adventures Institute
16 for elk hunting, deer hunting, bear hunting.

17 And I've written this all out for you and you'll
18 have the opportunity to look at it, and then we've attached the
19 various -- various links that we think are relevant. And I
20 believe that's holding yourself out as an outfitter.

21 Now, having said that, what is he doing today
22 even as we speak? And I see some of you have this up in front
23 of you. There have been some changes, but many of the things
24 are the same.

25 He's holding himself out as a retired outfitter.

1 Well, he's not a retired outfitter.

2 I believe he's holding himself out as a retired
3 guide. He's not a retired guide either.

4 He has a section on his Web site, it's a pop-up
5 in the photo gallery representing what elk hunting is like.

6 And he also represents -- I don't have pictures
7 with me but they're on there. He's representing what bear
8 hunting is like as well and what deer hunting is like, again,
9 with the A-W Outfitters at the bottom as the domain.

10 He has pictures of various hunters with their
11 trophies, which I believe is designed to indicate to the public
12 that for all practical purposes, come to AW Adventures
13 Institute, Sandy Podsaid, and we'll get you set up for your
14 hunt.

15 He has a pop-up that currently says: We will --
16 if you would like to send us a little information about
17 yourself and the type of hunting you are interested in learning
18 about, when we talk, we will have a good idea of your needs.

19 So, again, we believe he is offering hunts as an
20 outfitter.

21 He's got a section that's changed from April and
22 I can't even say where it is, but it's sort of an application
23 section where he talks about the experience -- experience the
24 spectacular mountains of North Idaho. We oper- -- we operate
25 from our mountain ranch located near Coeur -- near Coeur

1 d'Alene, Idaho. This section has changed from the April 2009
2 section.

3 And what I'd like to do is make these changes
4 part of record as well to kind of show what he's doing now.

5 A VOICE: Here.

6 MR. KANE: So the first one would be the screen
7 that I just spoke to.

8 MR. HALES: So I'm going to mark this first
9 advertising Exhibit F.

10 (Exhibit F was marked for identification.)

11 MR. KANE: And then the next change that's sort
12 of new that's in current, existing, is a pop-up: AW Adventure
13 Institute, Idaho big game hunting, elk, mule deer, bear hunts,
14 Sandy Podsaid, hunting consultant. And among other things, he
15 talks about an adventure of a lifetime through Bitterroot
16 Mountain Outfitters, and then he has a section that says: This
17 is what our Idaho licensed outfitters are renowned for.

18 So I believe that's a change from the April
19 section.

20 MR. HALES: Mark that second advertisement as
21 Exhibit G.

22 (Exhibit G was marked for identification.)

23 MR. KANE: Another section that's new in another
24 pop-up is dealing with Idaho bear and mountain lion hunts.
25 Bear hunts are conducted from tent camps and take place in both

1 spring and fall. That's new. But also new is a sentence that
2 says "Our outfitter specializes in bow hunting," and talks
3 about a 70 percent bow hunting for bear. So that's new.

4 MR. HALES: Mark the third advertising as
5 Exhibit H.

6 (Exhibit H was marked for identification.)

7 MR. KANE: And then there's another new section
8 that deals with mountain lions, it's another pop-up, and the
9 first line is: Mountain lion hunts are also available during
10 the winter months.

11 So that's another change.

12 MR. HALES: Fourth advertising, Exhibit I.

13 (Exhibit I was marked for identification.)

14 A VOICE: And these advertisings are really
15 consecutively as pop-ups on the Web site.

16 MR. KANE: Correct.

17 A VOICE: Consecutively then.

18 MR. KANE: Yes, Mr. Chairman, Commissioner Long,
19 as of today, I pulled these up today. And, of course, many of
20 the things are still the same as they were in April.

21 So, why is this all important? Well, because in
22 2006 the Board dealt with Internet advertising and at that
23 time, if you look at my Memorandum regarding Applicant's
24 Internet advertising, there was a colloquy between the Board
25 and between Mr. Podsaid -- and I've got that in the middle of

1 the page -- because the Board was concerned and told him at
2 that time that it's not just what you say, it's what you imply
3 by way of being an outfitter. And it's before you. Mr. Farr
4 was concerned about that, and Mr. Podsaid acknowledged pulling
5 the word "outfitter" off and was told at the time as long as
6 it's not even implied is the point.

7 So while Mr. Podsaid never necessarily holds
8 himself out as an outfitter using those words, I would submit
9 that he does imply that he's on outfitter throughout his Web
10 site, both in April and now. And I believe that is a violation
11 of the law. If you're not a licensed outfitter, you shouldn't
12 be implying or telling people or advertising that you do
13 outfitting or outfitting activities.

14 So, with all that, what I would suggest is that
15 that is someone who is -- should be of concern to you whether
16 it's a new application or a continuing application, either way
17 you look at it. It's -- it's ongoing activity that I think
18 would be grounds for denying the license.

19 Now, if you determine with your lawyer's advice
20 that it is a new application -- and there is a section here in
21 my memo where I talk about new applications also apply to
22 people who have once been licensed but are not currently
23 licensed, as I believe Mr. Podsaid is -- then you can also take
24 into consideration all of the other stuff that happened as far
25 back as 2006.

1 That's my presentation.

2 MR. HALES: Okay. Does the Board members have

3 questions for Mr. Kane?

4 MS. STARK: I have a question. In some of the

5 past advertising that he did, I don't know how he did this, but

6 he cut and pasted the names of other outfitters and links to

7 their Web sites that it appeared that he was also representing,

8 and that's in some of the originals. I'm not seeing it in this

9 current format, and obviously then that comes into whether this

10 is current or past.

11 MR. KANE: Right.

12 MS. STARK: Whether he did document the past or

13 not.

14 MR. KANE: Right.

15 MS. STARK: But I've talked to a couple of these

16 people. They were unaware that someone else was representing

17 or had made mention of their business on his Web site.

18 MR. KANE: I can't speak to that. I have no

19 information about that at all.

20 MS. STARK: Because if they're -- I mean, they're

21 just, you know, they're outfitter friends, and it was like, Did

22 you -- are you using Sandy as your booking agent?

23 MR. HALES: And, Louise, I've got to tell you --

24 MS. STARK: That we can't go into this.

25 MR. HALES: -- we've got to be careful, because

1 in reality what you need to base your decision on today is
2 what's been presented --

3 MS. STARK: Is just what's there.

4 MR. HALES: -- presented by the prosecutor. And
5 to the extent that you go outside that record and start talking
6 to people, then there's the possibility that it could --

7 MS. STARK: Contaminate this or something.

8 MR. HALES: -- create some problems for the Board
9 in regards to its Decision. So I appreciate what you're
10 saying --

11 MS. STARK: Good.

12 MR. HALES: -- also understand the importance of
13 it, but really we need to confine the Decision based upon the
14 record that's presented today.

15 MS. STARK: Thank you.

16 MR. HALES: Any other questions for Mike.
17 Mr. Chairman, could I ask Mike a couple
18 questions?

19 CHAIRMAN HUNSUCKER: Sure.

20 MR. HALES: So, Mike, assuming that the Board
21 views this as a new application, which opens up I think a lot
22 more of matters to consider --

23 (Sounds.)

24 MR. HALES: -- potentially in this licensing
25 Decision, do you think that the issues you've raised affect his

1 good moral character?

2 MR. KANE: Well, yes. I mean, ultimately, good
3 moral character is a thing that you need to be taking into
4 consideration at all times when you're dealing with a
5 license -- licensed Applicant, and it is fairly
6 all-encompassing, I would think. But I think if you narrow it
7 down -- I don't think the Board would really care very much
8 if -- you know, if somewhere in Mr. Podsaid's past he had a
9 driving without privileges or something like that, but the
10 reason I'm looking at -- more closely to outfitting activities
11 is why I think it's relevant because we're dealing with a
12 situation where in 2006 he was spoken to about implying that he
13 was an outfitter when he wasn't. He was put on notice in 2009,
14 in February, of what we knew about what he was doing, made
15 changes, but still those changes imply that he's an outfitter.
16 So I believe -- and that is also a violation of the law. It is
17 a violation.

18 MR. HALES: Obviously --

19 MR. KANE: And that fits in with the moral
20 character part of the analysis.

21 MR. HALES: And certainly the Board has the
22 ability to look at somebody and determine, one, whether they're
23 competent; two, whether they're of good moral character; and
24 then beyond that, they can also consider whether the Applicant
25 has violated any of the provisions of the act or the rules that

1 the Board would otherwise possess jurisdiction for
2 disciplinary, so to speak.

3 And so I think that your other point is that not
4 only is his moral character potentially impacted by the fact
5 that he's continued to advertise in a way that violates or
6 misleads, but additionally, the fact that he's advertising in
7 this fashion also violates the law and the rules.

8 MR. KANE: Right. And I guess, ultimately, it
9 comes down to the Board's duty to protect the public, and I
10 don't think it's being very well protected right now when the
11 gentleman is essentially implying that he's an outfitter.

12 MR. HALES: Okay. Any other questions for
13 Mr. Kane?

14 I assume, Mr. Kane, you want to move for the
15 admission of all of these exhibits.

16 MR. KANE: Please. I thought I was sort of doing
17 that.

18 MR. HALES: Well, we've been a little informal in
19 that regard.

20 MR. KANE: Okay. Thanks.

21 MR. HALES: But I assume, Mr. Chair, that the
22 Board would deem all of the exhibits admitted that were marked
23 today, I assume.

24 CHAIRMAN HUNSUCKER: Yeah, I don't have any
25 objection to it.

1 MR. HALES: Any objections from the Board
2 members? Okay.

3 (Exhibits A through H were admitted into
4 evidence.)

5 MR. HALES: So if there's no other questions for
6 Mike, then I think we will close the hearing.

7 MR. KANE: Let me follow up with one other point
8 I'd like to make --

9 MR. HALES: Okay.

10 MR. KANE: -- Mr. Chairman, and that's this:
11 Again, what's happening is here we have notified Mr. Podsaid
12 that we were going to be having this discussion. We've
13 essentially given him the opportunity to come and speak to you.

14 What I would -- if you decide to not grant the
15 license, he still has an opportunity within 21 days to ask for
16 a formal contested hearing, and I would ask you to include that
17 in your Order so that there's no question that he does have
18 that opportunity. And I believe that would speak to
19 Ms. Weeks's concern in her letter about the contested case.
20 That's your contested case.

21 CHAIRMAN HUNSUCKER: Okay.

22 MR. HALES: Okay, any other questions from the --

23 (Disc No. 3.)

24 MR. HALES: Okay, any other questions from the
25 Board members?

1 So I think at this point, we'll close the
2 hearing.

3 (The hearing concluded.)
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1 REPORTER'S CERTIFICATE

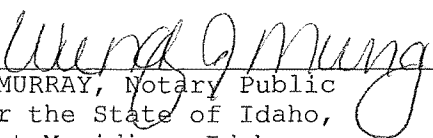
2 STATE OF IDAHO)
3) ss.
4 County of Ada)

5 I, WENDY J. MURRAY, a Notary Public in and for
6 the State of Idaho, do hereby certify:

7 That the foregoing hearing was manually
8 transcribed by me from compact disc recording, and that the
9 transcript contains a full, true, and verbatim record of the
10 said hearing, to the best of my ability.

11 I further certify that I have no interest in the
12 event of the action.

13 WITNESS my hand and seal this 6th day of
14 September, 2012.

15
16 
17 WENDY J. MURRAY, Notary Public
18 in and for the State of Idaho,
19 residing at Meridian, Idaho.
20 My Commission expires 2-8-2014.
21 Idaho CSR No. 475.



STATE OF IDAHO
COUNTY OF SHOSHONE/SS
FILED

2013 JAN 14 PM 1:59

PEGGY WHITE
CLERK DIST. COURT

BY: *[Signature]*
DEPUTY

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Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

A.T. "SANDY" PODSAID,

Case No. CV-08-807

Petitioner,

OPENING BRIEF

vs.

STATE OF IDAHO OUTFITTERS AND
GUIDES LICENSING BOARD, a state agency,

Respondent.

I. INTRODUCTION

This matter involves an appeal of a motion made at a June 26, 2008 board meeting of the Idaho Outfitters and Guides Licensing Board ("IOGLB") to terminate the guide license of A. T. "Sandy" Podsaid ("Podsaid"). The process used by IOGLB was riddled with procedural irregularities, statutes were violated, due process was ignored and the decision reached was not supported by substantial and competent evidence.

II. STATEMENT OF THE CASE

A. *Nature of the Case*

This appeal involves A.T. "Sandy" Podsaid's guide license. On June 26, 2008, the Idaho Outfitter Guide and Licensing Board apparently considered a request for an amendment to Podsaid's guide license to allow him to guide for Darrel Thorne, although no such request is included in the record. It is unclear from the record if this was a *sua*

OPENING BRIEF: 1

sponte action by the Board due to a sale of Podsaid's outfitter business or it was requested by Podsaid. The Board then proceeded to handle the amendment request as though it were a contested case, despite reassurances made by IOGLB's counsel to Podsaid's counsel initially that the matter was an administrative action to determine whether to allow the amendment request. The Board granted the amendment request to allow Podsaid to guide for Thorne, but then notified Podsaid's counsel that the license would expire December 31, 2009, despite the fact that it had an expiration date of March 31, 2009.

B. Course of Proceedings and Statement of Facts

Podsaid has been licensed as a guide with IOGLB since August, 1986. (R., p. 071.) On July 27, 2007, IOGLB's attorney, Steven F. Scanlin, Podsaid's attorney negotiated a complaint filed by IOGLB in Administrative Complaint Case No. 07-2594-04. (R., pp. 001-3.) At a Board meeting held July 30-31, 2007, the Board voted to accept the settlement agreement presented by its attorney. (R., pp. 006-15.) The agreement was executed by Podsaid on August 10, 2007. IOGLB executed the agreement on August 10, 2007. (R., p. 023.) On August 18, 2007, IOGLB entered an order accepting the settlement agreement. (R., pp. 016-17.) In August 2007, another Order was entered consistent with the settlement agreement. The agreement placed Podsaid's guide license on probationary status to guide for Bitterroot Mountain Outfitters through October 1, 2007. (R., pp. 020, clause 9.) Podsaid was prohibited from seeking an amendment to his guide license during the period of probation. (R., p. 021.)

IOGLB issued a renewed Guide License to Podsaid on April 11, 2008, with an expiration date of March 31, 2009. Podsaid was also issued an Outfitter license covering the same dates. (R. p. 029.)

In compliance with the settlement agreement, on June 2, 2008, Podsaid entered into a buy and sell agreement of his outfitter business to Darren Thorne. (R., pp 030-035.)

On June 10, 2008, Roger Hales, sent McHugh an electronic correspondence indicating he represented the Board. Hale stated he had reviewed prior correspondence between McHugh and Executive Director, Jake Howard, and the buy/sell agreement.¹ Hales indicated McHugh's reading of Board Rule 28.03 was correct, and Podsaid was not required to notify the Board until the sale was complete. However, Hale requested the agreement be changed to provide for refunds to clients who had booked with Podsaid. Hales also indicated it was his recommendation that the sales agreement be deferred to the Board for review and approval. Hales also indicated that Podsaid's license request that his license be amended to allow him to guide for Thorne would be heard by the Board at the same time. (R., p. 042.)

McHugh replied on June 12, 2008, McHugh questioned the necessity of a Board hearing. McHugh father requested clarification if there was anything about the sale that required the hearing and asked for an opportunity to present materials if there were issues. (R., p. 043.) Hales replied he understood the concern. Hales indicated because the sale was the result of a disciplinary proceeding, he felt it was appropriate that the Board approve the matter. McHugh inquired into the date of the hearing. (R., p. 044.) Hales responded with clarification that the Board was not holding a hearing. (R., p. 045.) McHugh inquired if Thorne could appear by phone. (R., p. 045.)

¹ The referenced correspondence between McHugh and Howard was not included by IOGLB in the record on appeal.

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On June 13, 2008, Hales responded that Podsaid could address the Board by phone. Hales indicated application reviews were undertaken in executive session because such materials were confidential under the Public Records Act (I.C. 9-340C(8). Hales suggested Podsaid provide a telephone number where he could be available to answer any questions or concerns of the Board. Hale stated he understood the Board intended to review applications on June 27, 2008, but the Board's schedule was full, which could interrupt the specific schedule. (R., p. 046.)

One June 17, 2008, IOGLB issued a notice of hearing that it would consider the proposed guide license application of Podsaid on June 27, 2008. (R., p. 036-037.) On June 17, 2008, IOGLB issued a notice of hearing that it would consider the proposed outfitter license of Podsaid on June 27, 2008. IOGLB also issued a notice of hearing that on June 27, 2008, it would consider the outfitter license application of Darren Thorne. (R., pp. 040-141.)

On June 23, 2008, McHugh responded. McHugh pointed out that Podsaid's guide license expiration was March 31, 2009, and apologized for his earlier miscommunication regarding the license expiration date. (The earlier correspondence referenced was not included by the record on appeal.) McHugh's correspondence indicated the guide license amendment Podsaid was requesting was to allow him to guide for Thorne. The electronic correspondence concluded that Podsaid remained available by telephone for the Friday hearing. (R., p. 047.) The referenced guide license amendment is not in the record on appeal. Hales responded that the Board's staff was in the process of contacting Thorne. (R., p. 049.) McHugh responded that he would inform Podsaid. McHugh inquired if someone would be contacting Thorne. (R., p. 050.)

On June 26, 2012, Hales informed McHugh the Board had interviewed Thorne and considered the purchase and Podsaid's license amendment request. Hales indicated the Board approved the sale, but required Thorne and Podsaid to jointly notify booked customers of the sale. Thorne's outfitter license was also approved. The correspondence also indicated that the Board terminated Podsaid's license based upon the sale. The Board granted Podsaid's guide license amendment to allow him to guide for Thorne, but determined that his guide license would expire December 31, 2008 based upon the Board's previous disciplinary order. Hales informed McHugh that Podsaid had 14 days to seek reconsideration of the Board's decision. No authority other than the prior disciplinary order was cited to for the Board's authority to amend the expiration date of Podsaid's guide license. (R., p. 051.) On June 26, 2012, McHugh sent Hales correspondence requesting information on the sale and guide license issue as Podsaid was coming out of camp for the hearing on June 27, 2012. (R., p. 052.)

The minutes of the Board Meeting of June 24-26, 2008 indicate that the Board entered into executive session at 11:10 a.m. on June 26, 2008 pursuant to I.C. § 67-2345(1)(a) to review potential litigation with Board Attorney Hales. The session reconvened at 11:40 a.m. Immediately thereafter, a motion was made to approve the sale by Podsaid to Thorne; on the condition that Podsaid and Thorne notify all current customers in writing of the change in outfitter; that the name of all clients be submitted to the Board by August 1, 2008; that Thorne's outfitter license was approved; that Podsaid's outfitter license was terminated based upon the sale; and that they were allowing an amendment to Podsaid's guide license to allow him to guide for Thorne, with the guide license to terminate December 31, 2008 consistent with the Board's prior disciplinary order. (R. p. 060-063.)

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On June 27, 2008, McHugh wrote Hales and sought clarification of the date of termination on the outfitter license. McHugh also asked for clarification on the date the 14 day reconsideration ran and expressed disagreement with the action. (R., p.064.) On June 27, 2008, Hales responded to the clarification request. (R., p. 065.) On June 30, 2008, Hales wrote with further clarification of points on the sale and indicating the 14 day period ran from June 26, 2008.

On July 9, 2008, McHugh faxed a letter to Howard asking for reconsideration of the Board's decision to change the expiration of Podsaid's license from March 31, 2009 to December 31, 2008. McHugh indicated he was unable to provide with specificity any grounds for the request as the Board minutes had not been provided to him despite requests for them. McHugh asked the hearing on the matter be scheduled to November or December rather than August, 2008, to allow Podsaid to guide for Thorne for the fall hunt. (R., p. 068-069.)

On July 31, 2008, IOGLB issued an Amended Guide license to Podsaid which continued to show an expiration date of March 31, 2009. (R. p. 067.)

On November 5, 2008, Hales wrote McHugh in response to the July 9, 2008 hearing request. Hales indicated the hearing was scheduled for December 8, 2008. (R., p. 070.)

Thereafter McHugh became a county prosecutor and Podsaid undertook his own representation. On November 17, 2008, Podsaid wrote Hales informing of this fact and indicating he objected to the procedure being utilized by the Board. Podsaid indicated he had a guide license originating in 1986. Podsaid cited to I.C. § 67-5254 and noted that no hearing had occurred, and no written decision was issued regarding his license. Podsaid withdrew the request for a reconsideration hearing and demanded the Board follow

proper procedures. (R., p. 071.) Hales responded to the letter on the same date. Hales forwarded the letter that had been provided to McHugh and indicated it was Podsaid's decision whether to attend the hearing or not. (R. pp. 072-074.) On November 20, 2008, the Board issued a Notice of Hearing for the matter to be held December 8, 2008 in Boise, Idaho. (R., p. 107.)

On December 4, 2008, Podsaid received confirmation from Thorne that he intended to use him for the mountain lion hunting and snowmobiling season for winter of 2008-2009. (R., p. 076.)

On December 7, 2008, Shawn Martz wrote a letter in support of Podsaid's license amendment request. (R., p. 077.)

On December 8, 2009, Podsaid's motion to reconsider was heard. The Hearing Officer was board attorney Hales. (R. p. 093.) Mike Kane appeared for the Petitioner. Kane identified himself as the prosecutor for the Board. (R., p. 098.) Podsaid appeared pro se. (R., p. 094.) Podsaid was identified as the Respondent and Jake Howard, Executive Director for IOGLB, was identified as the petitioner. Evidence was presented as though it were a contested case. (R., pp. 095-158.)

The hearing officer opened the hearing, and indicated the hearing record should include the application file of Podsaid (if such a record existed, it was not included in the record on appeal); any correspondence between the Board and Podsaid in regards to the matter, and any documents provided at the hearing. (R., pp. 093-097.) The hearing officer indicated he was acting as the presiding officer to simply organize and conduct the hearing. (R., p. 098, L. 7-11.) The Board was also present. (R., 098, L. 12-17.)

Although the matter was scheduled as a motion to reconsider a Board action revoking and terminating Podsaid's license effective December 31, 2008, Kane was not

limited by the hearing officer to arguing evidence that were already in the record. Instead, Kane was allowed to introduce documents to the Board to review, as well as argument pertaining to those documents. (R., pp. 099-108.) Podsaid then followed the same format as used by Kane and made argument and admitted evidence. (R., pp. 108-125.) Following Podsaid's presentation, Hales inquired if the Chairman of the Board had questions for Podsaid. (R., p. 125, L. 14-15.) At that point, the Chairman indicated he had no questions, but stated he took issue with Podsaid's arguments, and explained why he had issues with Podsaid's position. (R., p. 125 L. 16 – p. 126, L. 22.) Podsaid inquired if he could respond. (R., p. 126, L. 23.) At which point, Kane interrupted indicating he had more evidence. (R., p. 126, L. 24-25.) The Hearing Officer allowed the Board to continue questioning Podsaid. (R., p. 127, L. 3 – p. 135, p. 9.) Kane then added additional evidence to the record. (R., p. 135, L. 11-16.) Kane then was allowed to call a witness to take testimony. Jake Howard, Executive Director, was called and gave testimony. (R., p. 136, L. 12- p. 141, L. 23.) Podsaid was then asked if he had more evidence to present. (R. p. 142, L. 3 – p. 143, L. 2.) The hearing officer then allowed Kane more argument. (R., p. 143, L. 6 – 144, L. 19.) The hearing officer then gave Podsaid an opportunity to close arguments. (R., p. 144 L. 20 – p. 146, L. 6.) The Chairman then closed the hearing. (R., p. 146, L. 7-12.) The Board then moved into executive session to deliberate over the objection of Podsaid. (R., p. 146, L. 13 – p. 148, L. 19.) The next matter in the record is a question from Thomason asking "So this is the deliberation part of the –" (R., p. 148, L. 24-25.) Chairman Hunsucker responded that was correct, the matter was in deliberation. (R., p. 149, L. 1-2.) The hearing officer then indicated he wanted to back up a little bit for the purpose of making sure they had a full

record on the deliberation. (R. p. 149, L. 6 – 9.) The hearing officer then stated on the record:

Motion has been made by Will Judge to affirm the Board's prior Decision to end Mr. Podsaid's guide license as of December 31, 2008. Essentially, what Mr. Judge stated was that he had not heard anything today that convinced him that the Board was in error in its previous Decision. Mr. Judge did make the motion. It was seconded by Chris Korell.

And then at this point, Board member Tom Long has asked a question and the question relates to listening to or having Counsel read part of one of the exhibits that's been introduced

(R., p. 149, L. 11-17.)

Outside the statements of the Hearing Officer, deliberations were not included on the record, no motion was included in the hearing record, and no second of the motion was in the hearing record.

On December 18, 2009, Findings of Fact, Conclusions of Law and a Final Order were issued by the Executive Director. The decision format used was that of a contested case. The order contended it was the final order of IOGLB, although IOGLB had previously taken the position that its Board action of June 25, 2009 was its final order. (R., pp. 081-84.) The certificate of service does not indicate that the Final Order was sent to Podsaid. (R., p. 084.)²

The findings of the board were: "The Respondent's guide license associated with Bitterroot Mountain Outfitters would terminate under the stipulation as of October 1, 2007 (Section 9, Settlement Agmt.)" (R., p. 081.) The Board further found that the settlement agreement respondent was issued a restricted and probationary sole-proprietor license which included a guide license. (Section 10, Settlement Agmt.) (R., p. 081.) The

² As the court may recall from the Podsaid affidavit filed herein, he called and inquired about the order on several occasions and was never sent the order.

Board found the terms of the restricted guide license provided he would not book clients for outfitting or guiding in 2009. (Section 11, Settlement Agt.) (R. p. 082.) The final finding of fact was that the settlement agreement allowed Podsaid to seek licensure as an outfitter from April 1, 2008 through December 21, 2008. (R., p. 082.) The Board reiterated its action at the June 26, 2008 Board meeting and affirmed its prior decision. (R., p. 082.)

On December 30, 2008, Podsaid filed a Petition for Judicial Review in this matter. On January 7, 2009, Podsaid moved ex parte to stay the agency's action. On January 12, 2009, the Court issued its order to shorten time to hear the motion to stay, and scheduling the matter for hearing on January 20, 2009.

On January 9, 2009, IOGLB filed a Notice of Lodging Board Order. On the same date, IOGLB filed its opposition to the ex parte motion to stay.

On January 20, 2009, Susan Weeks appeared for Podsaid. On the same date, affidavits and memorandum in support of the motion were filed. On January 21, 2009, the Court entered its order granting Podsaid's motion for temporary stay.

III. ARGUMENT

A. Standard of Review

Idaho's Administrative Procedures Act, I.C. §§ 67-5270 to – 5279 controls the review of this matter. The scope of review is provided for in I.C. § 67-5279, which provides:

Scope of review -- Type of relief. (1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(2) When the agency was not required by the provisions of this chapter or by other provisions of law to base its action exclusively on a record, the court shall affirm the agency action unless the court finds that the action was:

(a) in violation of constitutional or statutory provisions;

- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure; or
- (d) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole;

or

- (e) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

Further, the appellate Court defers to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record. *MacLay v. Idaho Real Estate Commission*, ___ Idaho ___, ___ P.3d ___ (2012 Opinion No. 25.)

B. Applicable Law

Title 36, Chapter 21, Idaho Code provides for the licensing of outfitters and guides in Idaho. An outfitter and a guide are each separately defined, engage in separate activities and have separate licenses. An outfitter is deemed to include persons who advertise or hold themselves out to the public for hire; provides facilities and services for hire; and leases or uses equipment or accommodation for compensation for outdoor recreational activities related to hunting and fishing. (I.C. § 36-2102(b)). A guide is considered to be any natural person who is employed by a licensed outfitter to furnish personal services for the conduct of outdoor recreational activities directly related to the conduct of activities for which the employing outfitter is licensed. (I.C. § 36-2102(c)). Any license issued to an outfitter or any license issued to a guide may be suspended or

revoked for the reasons set forth in I.C. § 36-2113. The procedure to be followed for suspension or revocation of a license are set forth in I.C. § 36-2114. Idaho Code § 36-2115 provides that any person aggrieved by any action of the board in denying the issuance of or in the suspension or revocation of an outfitter's or guide's license may proceed as provided in chapter 52, title 67, Idaho Code. Further, I.C. § 36-2119(a) mandates that all rules and orders be made in accordance with chapter 52, title 67, Idaho Code.

In the administrative rules adopted pursuant to Title 36, outfitters are defined the same as the statute (IDAPA 25.01.01.002.34), and so are guides (IDAPA 25.01.01.002.18). Licenses for outfitters (IDAPA 25.01.01.002.35) are handled separate from the licenses for guides (IDAPA 25.01.01.002.19). Each type of license carries its own requirements. (IDAPA 25.01.01.004).

Idaho Code § 67-5201(6) defines a contested case to mean a proceeding which results in the issuance of an order. Idaho Code § 67-5240 expands this definition and says it is any proceeding by an agency, other than the public utilities commission or the industrial commission, which may result in the issuance of an order by the agency is a contested case and is governed by the provisions of this chapter of the code, unless otherwise provided by law.

Idaho Code § 67-5240 establishes the procedures to be utilized by the agency when a license is involved. The portions relevant to the present appeal provide:

AGENCY ACTION AGAINST LICENSEES. (1) An agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute.

(2) When a licensee has made timely and sufficient application for the renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by a reviewing court.

Finally, Idaho Code § 67-5242 sets forth the procedures to be utilized for the hearing of a contested case. The statute requires the following:

PROCEDURE AT HEARING. (1) In a contested case, all parties shall receive notice that shall include:

- (a) a statement of the time, place, and nature of the hearing;
- (b) a statement of the legal authority under which the hearing is to be held; and
- (c) a short and plain statement of the matters asserted or the issues involved.

(2) The agency head, one (1) or more members of the agency head, or one (1) or more hearing officers may, in the discretion of the agency head, be the presiding officer at the hearing.

(3) At the hearing, the presiding officer:

- (a) Shall regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary.
- (b) Shall afford all parties the opportunity to respond and present evidence and argument on all issues involved, except as restricted by a limited grant of intervention or by a prehearing order.
- (c) May give nonparties an opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.
- (d) Shall cause the hearing to be recorded at the agency's expense. Any party, at that party's expense, may have a transcript prepared or may cause additional recordings to be made during the hearing if the making of the additional recording does not cause distraction or disruption.
- (e) May conduct all or part of the hearing by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place.

Under the authority of Title 67, Chapter 52, the Idaho attorney general has adopted the Idaho Rules of Administrative Procedure of the Attorney General. (IDAPA 04.11.01). Unless an agency opts out of these rules, they control the administrative

procedures of the agency. (IDAPA 04.11.01.003). IOGLB has not opted out of these rules.

A contested case is simply defined by the rules as one which results in a rule or an order. (IDAPA 04.11.01.005.06). An order is defined as an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons. (IDAPA 04.11.01.005.12). Rules 104-199 of IDAPA 04.11.01 establish the various mechanisms for bringing forth a contested case. Rule 104 provides that formal proceedings must be initiated by a document (generally a notice, order or complaint if initiated by the agency) or another pleading listed in Rules 210 through 280 if initiated by another person. The rules contemplate that there will be pleadings setting forth the position of the parties. (Rules 210-299). Rule 550 (IDAPA 04.11.01.500) requires that following the exchange of pleadings, discovery, motions and a pre-hearing conference that the matter will be set by a hearing officer for hearing. Following the hearing, a written preliminary order is issued. (Rule 730). The preliminary order must be accompanied by a document with specific information listed as required by Rule 730 which contains information regarding finality of the order and review of the order.

C. Alleged Errors

IOGLB's June 25, 2008 order and its decision to affirm its previous actions are contrary to I.C. § 67-5279(3) because the order was not supported by substantial evidence on the record as a whole; exceeds IOGLB's statutory authority; is made upon unlawful procedure; violates constitutional or statutory provisions; and is arbitrary, capricious, and an abuse of discretion. Further, the decision prejudices Podsaid's substantial rights.

Following the signing of the settlement agreement, and after the probationary period set forth in the settlement agreement, IOGLB issued Podsaid a license on April 11, 2008 with an expiration date of March 31, 2009.

Despite the notice of hearing the Board issued that it was going to “consider” Podsaid’s license on June 27, 2008, and arrangements made by Podsaid to be available by telephone on June 27, 2008, the Board determined at a Board meeting to terminate Podsaid’s license effective December 31, 2008. When McHugh asked the basis for this action, Hales responded: “I believe it is *implicit* that his guide license should expire when the Outfitters License expires.” (Emphasis added.)(R., p. 048.)

As noted in the facts in this matter, Podsaid questioned Hales about the agency’s failure to provide for a license hearing and issue a written order prior to modifying the expiration date of his guide license. In Hales’ response to Podsaid’s concerns, Hales informed Podsaid that the Board’s action was proper because it occurred at a publicly held Board meeting to which he was invited through McHugh. (R., p. 073.) Despite Podsaid’s withdrawal of the motion to reconsider, and the grave concerns he expressed regarding the inappropriate procedures being followed, IOGLB issued a Notice of Hearing that Podsaid’s motion for reconsideration of the Board’s hearing would be held on December 8, 2008.

Idaho Code § 36-114 provides the procedure the Board is to use if it is going to revoke or suspend a license. The Board may not avoid these requirements by referring to the revocation as a “termination” of the license effective on a given date. Further, Idaho Code Idaho Code § 67-5254(1) provides in relevant part that an agency shall not modify a license unless the agency first gives appropriate notice and an opportunity for a contested case in accordance with the provisions of Chapter 52, Title 67. As can be seen

from the history recited above and the facts placed in the record, the agency did not follow either Idaho statute or the Idaho Administrative Procedures Act when it modified Podsaid's expiration date of his guide license.

None of the proceedings recited herein comported in any respect with the statutes or proper contested case rules. Podsaid was not informed that his license was being considered for disciplinary action based upon I.C. § 36-2113. He was afforded none of the procedural safeguards set forth in I.C. § 36-2114.

Regarding the initial board action of June 25, 2008, Podsaid was not given notice of a contested case as required by I.C. § 67-5242. He was not provided notice that included a statement of the legal authority under which the hearing was to be held; and a short and plain statement of the matters asserted or the issues involved. In fact, the record is void of any such notice ever being provided to Podsaid. The June 25, 2008 order was never placed in writing as required by I.C. § 67-5248. In sum, the agency ignored all aspects of Idaho's Administrative Procedures Act in issuing its June 25, 2008 order.

Regarding the board hearing held on December 8, 2008, Podsaid was not given notice of a contested case as required by I.C. § 67-5242. He was not provided notice that included a statement of the legal authority under which the hearing was to be held; and a short and plain statement of the matters asserted or the issues involved. Again, the record is void of any such notice ever being provided to Podsaid. The December 18, 2005 order was not served on Podsaid as required by I.C. § 67-5248. Once again, the agency ignored all aspects of Idaho's Administrative Procedures Act in issuing its June 25, 2008 order. Therefore, the Board's actions in this matter exceeded its statutory authority and were made upon unlawful procedure.

Further, The Board violated Podsaid's due process rights. As noted in *Cooper v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 134 Idaho 449, 454, 4 P.3d 561, 566-567 (2000):

The holder of a professional license has a valuable property right protected by the safeguards of due process. *H & V Eng'g, Inc. v. Idaho State Bd. of Prof'l Eng'rs*, 113 Idaho 646, 649, 747 P.2d 55, 58 (1987); see also *Abrams v. Jones*, 35 Idaho 532, 543, 207 P. 724, 726 (1922). In order to satisfy due process, the complaint must specify the particular acts of unprofessional conduct alleged. *Abrams*, 35 Idaho at 544, 207 P. at 726. The professional is not required to defend against or explain any matter not specified in the charges. *Id.* at 545, 207 P. at 726 (citing *In re Baum*, 32 Idaho 676, 687, 186 P. 927, 931 (1920)). IDAPA also requires "a short and plain statement of the matters asserted or the issues involved." I.C. § 67-5242(1).

As further stated by the *Cooper* Court: "It is elementary that in any judicial or quasi-judicial proceeding, a pleading in the nature of an accusation or complaint must contain positive statements of the essential facts, and that it is insufficient where it merely states conclusions.... [The defendant] was entitled ... to have the charges set out specifically, in order that he might have time and opportunity to prepare his defense." *Abrams*, 35 Idaho at 544, 207 P. at 726." *Id.* Further, the *Cooper* Court held: "Because the Board did not provide Cooper with specific notice of all charges brought against him for which he was disciplined, it violated Cooper's due process rights." *Id.* Thus, in the present case, IOGLB violated Podsaid's due process rights.

Even more perturbing is the Board's conduct at the hearing with legal counsel present. Over Podsaid's objection, the hearing was closed and the Board convened into executive session, although the grounds for the executive session were not placed in the record. It is clear from the record that the matter was deliberated in executive session given the fact that upon returning to the hearing the hearing officer "clarified" the record to place the motion and second on the record, and to place in the record some of the

Board's deliberations. It is clear the move to executive session was done so that Podsaid (and any reviewing Court) could not know what was discussed. This procedural tactic is not allowed pursuant to I.C. § 67-2345(4).

Further, IOGLB's actions are not supported by substantial and competent evidence in the record. As the *Cooper* Court held:

This Court defers to an agency's findings of fact unless those findings are clearly erroneous and unsupported by substantial evidence in the record. *See Lamar Corp.*, 133 Idaho at 39, 981 P.2d at 1149; I.C. § 67-5279(3). However, this Court must look to the record as a whole, rather than referring to portions of the record in isolation. I.C. § 67-5279(3); see also *Gubler By and Through Gubler v. Brydon*, 125 Idaho 107, 110, 867 P.2d 981, 984 (1994); *Fuller v. State, Dep't of Educ.*, 117 Idaho 126, 127, 785 P.2d 690, 691 (Ct.App.1990). Evidence is substantial and competent only if a reasonable mind might accept such evidence as adequate to support a conclusion. *See Reiher v. American Fine Foods*, 126 Idaho 58, 60, 878 P.2d 757, 759 (1994). To establish whether an agency's action is supported by substantial and competent evidence, this Court must determine whether the agency's findings of fact are reasonable. *Industrial Customers of Idaho Power v. Idaho Public Utilities Comm'n*, 1 P.3d 786, 793 (2000). Cf. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948) (stating that a finding is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

Id. at 456, 4 P.3d at 568.

The parties in this matter entered into a settlement agreement August 10, 2007.

Clause 9 of that agreement addressed Podsaid's guide license and provided:

9. Upon the signature by the parties on this Settlement Agreement, Respondent Podsaid shall be licensed to guide under probationary status for Bitterroot Mountain Outfitters through a letter of temporary authorization issued by Executive Director Jake Howard. Said authority to guide for Bitterroot Mountain Outfitters shall be effective until October 1, 2007, and shall be subject to the following probationary terms:
 - a. Respondent Podsaid shall comply with local, state, and federal laws and rules related to his guide license.
 - b. Respondent Podsaid shall comply with all Board rules and orders.

- c. **Respondent Podsaid shall not make any license amendment request to the Board during his period of probation.**

(Emphasis added.)

The record reveals that following the execution of this agreement, and after the probationary period set forth in the settlement agreement, IOGLB issued Podsaid a license on April 11, 2008 with an expiration date of March 31, 2009.

Further, the record shows that initially, IOGLB's attorney indicated the license was modified based upon an *implicit* term not found in the Settlement Agreement. Following the hearing, the Board indicated that the guide license associated with Bitterroot Mountain Outfitters terminated under the stipulation as of October 1, 2007. The Board indicated that Podsaid was issued a restricted outfitter license which included the guide license based upon clause 10 of the Settlement Agreement. Based on these findings, the Board affirmed its prior decision to allow an amendment to Podsaid's guide license to allow him to guide for Thorne, but to terminate the licenses December 31, 2008, consistent with the Board's prior disciplinary order.

It is well established Idaho law that the meaning of an unambiguous contract must be determined from the plain meaning of the contract's own words. *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995). Further, regarding settlement agreements, our Supreme Court held in *Young Electric Sign Co. v. State ex rel. Winder*, 25 P.3d 117, 121, 135 Idaho 804, 809 (2001). :

"Stipulations for the settlement of litigation are regarded with favor by the courts, and will be enforced unless good cause to the contrary is shown." *Kershaw v. Pierce Cattle Co.*, 87 Idaho 323, 328, 393 P.2d 31, 34 (1964). An agreement entered into in good faith in order to settle adverse claims is binding upon the parties, and absent a showing of fraud, duress or undue influence, is enforceable either at law or in equity. *Wilson*, 81 Idaho at 542, 347 P.2d at 345. A compromise agreement to settle a

dispute, when validly entered into, supersedes all prior claims and defenses. *Hershey*, 111 Idaho at 495, 725 P.2d at 200.

The substantial and competent evidence in this matter does not support the Board's affirmation of its June 26, 2008 action. The agreement specifically provided that there was a probationary period during which time Podsaid was limited in his guiding activities and limited in his ability to seek an amendment of his guide license. Thereafter, there were no limitations expressed in the agreement, and certainly no indicator the guide license would be terminated December 31, 2008. Clause 10 of the agreement contains no term limiting Podsaid's ability to obtain a guide license. In fact, clause 12 indicates the limit to December 31, 2008 applied only to Podsaid's outfitter license.

Further, the other facts in the record show that IOGLB did not adopt this contract interpretation until later. Podsaid was issued a separate guide license after the probationary period. The Board's decision is not supported by substantial and competent evidence in the record.

Finally, the Board's actions prejudiced Podsaid's substantial rights. It revoked his guide license, which resulted in Podsaid's inability to continue his chosen profession and earn a living. It also violated his rights to due process and a fair process to hear his matter. It caused him to proceed to hearing without a fair statement of the proceedings that would occur. Further, these transgressions are not moot given the expiration date of March 31, 2009. Podsaid has faithfully applied for renewals of his license. When a license is renewed and an agency desires to modify it on renewal, a specific rule applies to the renewal. Idaho Code § 67-5254 indicates when a licensee renews a license, the agency may not refuse to renew a license of a continuing nature when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice

and an opportunity for an appropriate contested case in accordance with the provisions of this chapter. Thus, Podsaid's status as a renewing licensee is significant to his right to be afforded due process in the license renewal process.³

The court has the authority pursuant to I.C. § 67-5279(3) to set aside the agency's action and remand this matter for further proceedings. On remand, Podsaid requests that this Court order that the agency comply with the substantive and procedure statutes cited herein, including proper notices and procedures. Podsaid further requests that the Court order that the agency use a third party hearing officer to conduct any future contested case regarding his license.

Podsaid is entitled to an impartial hearing officer. In *Johnson v. Bonner Cty. Sch. Dist. No. 82*, 126 Idaho 490, 887 P.2d 35 (1994), the Supreme Court noted that a trial court has the authority to halt administrative proceedings "upon a showing that there is a probability that the decisionmaker will decide unfairly any issue" before it. 126 Idaho at 493, 887 P.2d at 38. The Supreme Court found requiring a litigant to submit to a biased decisionmaker to be a "constitutionally unacceptable" violation of due process. *Id.* at 493, 887 P.2d at 38. Therefore, according to the Supreme Court in *Johnson*, "upon a showing that there is a probability that a decisionmaker in a due process hearing will decide unfairly any issue presented in the hearing, a trial court may grant an injunction to prevent the decisionmaker from participating in the proceeding." *Id.* at 494, 887 P.2d at 39. Given the procedural irregularities that permeated the matter before the Court, and the continuing procedural irregularities that occurred after, Podsaid requests that the

³ In fact, it is because of this significant right that Podsaid contends in the second appeal filed between these parties that the agency attempted to circumvent this Court's order and treat a license renewal as a new application.

Court order any further contested hearing regarding his license be conducted by an impartial hearing officer.

IV. ATTORNEY FEES

The most recent version of Idaho Code § 12-117 provides:

12-117. Attorney's fees, witness fees and expenses awarded in certain instances. (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

(2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

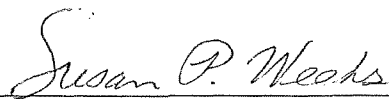
IOGLB is a state agency. Podsaid requests attorney fees be awarded to him on appeal.

V. CONCLUSION

For the foregoing reasons, the Court should reverse and remand the Board's June 25, 2008 decision, and the final order issued following the motion to reconsider.

DATED this 14th day of January, 2013.

JAMES, VERNON & WEEKS, P.A.



SUSAN P. WEEKS
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of January, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Michael Kane
Michael Kane & Associates, PLLC
P.O. Box 865
Boise, ID 83701-2865

<input type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input checked="" type="checkbox"/>	Telecopy (FAX) (208) 342-2323

Christine Elmore

MICHAEL J. KANE
MICHAEL KANE & ASSOCIATES, PLLC
 1087 W. River Street, Suite 100
 Post Office Box 2865
 Boise, Idaho 83701-2865
 Telephone: (208) 342-4545
 Facsimile: (208) 342-2323
 Idaho State Bar No. 2652

TE OF IDAHO
TY OF SHOSHO: 3
FILED
5 day of Feb
2013, at 4:00 clock P.M.
Shawnes
Deputy Clerk

ATTORNEYS FOR RESPONDENT

IN THIS DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

A.T. "SANDY" PODSAID,

Petitioner,

VS.

STATE OF IDAHO OUTFITTERS AND
GUIDES LICENSING BOARD, a state
agency.

Respondent.

Case No. CV-08-0807

RESPONDENT'S BRIEF

COMES NOW Michael J. Kane, of the firm Michael Kane & Associates, PLLC, Enforcement Attorney for the Respondent, STATE OF IDAHO OUTFITTERS AND GUIDES LICENSING BOARD (herein "Board" or "Respondent" or "Agency"), and hereby submits this Respondent's Brief.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

On August 10, 2007, the Board approved a Settlement Agreement between Petitioner ("Podsaid") and the Board to resolve four specific disciplinary complaints filed against Podsaid.

(R. 018-023). Pursuant to the Settlement Agreement and the Board's Order, the Board specifically dealt with Podsaid's outfitter and guide license. Podsaid's guide license associated with Bitterroot Mountain Outfitters would terminate under the stipulation as of October 1, 2007 (R. 020A-021). Pursuant to the Settlement Agreement and the Board's Order, Podsaid was issued a restricted and probationary sole-proprietor outfitter license which included a guide license. (R. 021). The terms of Podsaid's restricted outfitter and guide license provided that he could not book clients for outfitting or guiding services for the calendar year 2009. (R. 021). Further, the Settlement Agreement allowed Podsaid to seek licensure as an outfitter from April 1, 2008, through December 31, 2008. (R. 022). The Settlement Agreement specifically provided it was the intent of the Board that if AW-Outfitters was not sold on or before December 31, 2008, the license would terminate and the Board would treat the area as vacated and would open the area for a prospectus in accordance with applicable law. (R. 022). If Podsaid sought an extension of the outfitter license beyond December 31, 2008, the Board would only grant the extension if it was for the sole purpose of the selling the outfitter business and if Podsaid provided good cause for the extension. (R. 022).

On June 26, 2008, the Board considered Podsaid's request to approve the sale of his outfitting business to Darren Thorne. Pursuant to the application for an outfitter license by Darren Thorne, together with the proposed sale agreement for Podsaid's outfitting business to Mr. Thorne, the Board adopted the following motion:

DARREN THORNE APPLICATION - MSC (MOTION, Korell; SECOND, Long; AYES - All in favor; NAYES - None) Motion to: 1. Approve Sales Agreement between Podsaid and Thorne -Require both Podsaid & Thorne to jointly notify in writing all currently booked clients of the sale and identify Thorne as the new outfitter for their booked hunt and of their right to reimbursement - Require the name of all clients submitted to Board by August 1, 2008; 2. Approve Thorne for Outfitter license; 3. Terminate Podsaid's Outfitter license based upon sale; 4. **Allow an amendment to Podsaid's guide license to**

allow guiding for Thorne with Podsaid's guide license to terminate December 31, 2008, consistent with prior disciplinary Board order.

(R. 063) (emphasis added).

Podsaid was notified of the Board's decision to terminate his guide license as of December 31, 2008, and Podsaid requested the Board reconsider its decision. (R. 068-069). On December 18, 2008, the Board affirmed its prior decision that Podsaid's guide license would terminate on December 31, 2008. (R. 081-084).

Podsaid filed a Petition for Judicial Review. (R. 085-092).

STANDARD OF REVIEW

"The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code § 67-5279(1). The court shall affirm the agency action unless the court finds "that the agency's findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion."

Idaho Code § 67-5279(3).

ARGUMENT

Podsaid argues that the Board violated Idaho law and his due process rights by amending his guide license without providing him notice and a hearing. He also claims that the Settlement Agreement "contains no term limiting Podsaid's ability to obtain a guide license. In fact, clause 12 indicates the limit to December 31, 2008 applied only to Podsaid's outfitter license." (Opening Brief, p. 20). Podsaid cites to various Idaho statutes which are only relevant to

contested cases and the required notices and procedures required for such cases. Specifically, the main statute at issue in this case as cited by Podsaid is Idaho Code § 67-5254(1), which states that "[a]n agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a *continuing nature* when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case...." (emphasis added).

Podsaid's guide license was not a license of a continuing nature. It was a new application, a new outfitter, and a new area. As stated in the Settlement Agreement, Podsaid was issued a "restricted probationary sole proprietorship outfitter license (*a sole proprietor outfitter license is also a guide license*) ... Respondent may seek licensure as an outfitter from April 1, 2008 through December 31, 2008." (R. 021) (emphasis added). Podsaid was licensed as a sole proprietor, and a sole proprietor outfitter license includes a guide license. (R. 021, 137). When the sole proprietor outfitter license or any outfitter license is terminated, all the licenses are terminated. (R. 138). Once Podsaid entered into the Buy and Sell Agreement with Mr. Thorne and the Board approved the agreement, it terminated Podsaid's outfitter license based upon the sale and permitted an amendment to his guide license to allow him to guide for Mr. Thorne until December 31, 2008. Podsaid's outfitter license for AW-Outfitters (and therefore, his guide license as well) terminated upon the sale. Consequently, the Board's decision to issue the guide license for Podsaid to guide for Mr. Thorne was a separate action because it was a license to guide for a different outfitter in a different area. (R. 063, 141). It is true that the Board issued Podsaid a guide license card which listed an expiration date of March 31, 2009, but the date listed on the card was incorrect. As explained at the December 8, 2008, hearing, the outfitter and guide licenses are automated in the Board's licensing system and there is no way to individually

change a date on the card without overriding that system. (R. 139). As a result, the incorrect date was included on Podsaid's guide license card.

In the *negotiated* Settlement Agreement, Podsaid specifically agreed, and the Board ordered, that Podsaid was not to outfit or guide in the calendar year 2009. His guide license and outfitter license expired on December 31, 2008, by the terms of the Settlement Agreement. Because Podsaid's license is not of a continuing nature, the statutes, cases, and arguments made by Podsaid relating to the procedural requirements of contested cases are irrelevant.

It should also be noted that in reality, Podsaid got what he wanted regarding his guide license. The court ordered a temporary stay of the Board's modification of the expiration of Podsaid's guide license. This allowed Podsaid to guide until March 31, 2009, which is what he was seeking from the Board all along. Consequently, the issue of whether his guide license expired on December 31, 2008, is moot.

Podsaid also takes issue with the Board's decision to enter executive session after the hearing on December 8, 2008. He claims that "the hearing was closed and the Board convened into executive session...[i]t is clear the move to executive session was done so that Podsaid (and any reviewing Court) could not know what was discussed. This procedural tactic is not allowed pursuant to I.C. § 67-2345(4)." (Opening Brief, 17-18). The transcript from the December 8, 2008, hearing demonstrates that Podsaid is incorrect in his statement that the move to executive session was done to keep Podsaid from knowing what was discussed. Pursuant to Idaho Code § 67-2345(f), executive session is permitted "[t]o consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation." In response to a question regarding the legality of entering executive session, the hearing officer stated that "[t]o the extent that you're concerned that he may appeal your Decision, there may be litigation that emanates out of

this Decision today, then you have the opportunity to discuss with legal counsel that matter.” (R. 147). A Board member responded that he had a legal question regarding the case, and it appears that the Board entered executive session. (R. 147-148). The transcript goes on to demonstrate that the Board, outside of executive session and on the record, entered the “deliberation portion” of the case and then made its decision. (R. 149-157). There was clearly no violation of Idaho Code § 67-2345.

Podsaid is seeking an order from this Court requiring “an impartial hearing officer” for “any further contested hearing regarding his license” (Opening Brief, p. 21-22). This request is beyond the scope of appeal. It is the Board’s decision whether to hold any “further contested hearings regarding [Podsaid’s] license.” In addition, the Idaho Administrative Procedure Act provides judicial review of final agency action or final orders in contested cases. Idaho Code § 67-5270(2), (3). An order requiring a certain hearing officer for potential hearings in the future is not a final agency action or a final order in a contested case. As a result, there is no right of review and such an order is not permitted.

Podsaid requests attorney fees pursuant to Idaho Code § 12-117, which states that “the court . . . shall award the prevailing party reasonable attorney’s fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.” In *Rincover v. State, Dep’t of Fin., Sec. Bureau*, the Department of Finance relied upon specific provisions of a statute that had not yet been interpreted by the courts. *Rincover v. State, Dep’t of Fin., Sec. Bureau*, 132 Idaho 547, 550, 976 P.2d 473, 476 (1999). The Idaho Supreme Court found that even though the “district court below disagreed with the Department’s interpretation and application” of the statute, the Department’s action was not unreasonable. *Id.*

Here, there is no appellate case interpreting Idaho Code § 67-5254 as it applies to outfitter or guide licenses. As discussed above, the Board’s position that it acted in accordance

with Idaho law by not considering Podsaid's license as one of a continuing nature is a legitimate and valid argument based on the circumstances of this case. Therefore, the Board has not acted without a reasonable basis in fact or law and Podsaid is not entitled to costs and/or attorney's fees.

CONCLUSION

In light of the above, the Court should uphold the Board's decisions with respect to Podsaid's outfitter and guide licenses and find that Podsaid's licenses expired on December 31, 2008.

DATED this 15 day of February, 2013.

MICHAEL KANE & ASSOCIATES, PLLC

BY: Michael Kane
MICHAEL J. KANE
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of February, 2013, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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MICHAEL J. KANE

STATE OF IDAHO
COUNTY OF SHOSHONE/SS
FILED

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PEGGY WHITE
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Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

A.T. "SANDY" PODSAID,

Petitioner,

vs.

STATE OF IDAHO OUTFITTERS AND
GUIDES LICENSING BOARD, a state agency,

Respondent.

Case No. CV-08-807

REPLY BRIEF

I. INTRODUCTION

In its response, IOGLB contends in its statement of facts that under the terms of the 2007 Settlement Agreement Podsaid was issued an outfitter license which included a guide license. IOGLB contends with this concept in mind that all actions taken by it are consistent with the terms of the Settlement Agreement. Podsaid disagrees with this statement of fact and IOGLB's characterization of its applicable statutes and administrative rules.

II. STATUTES AND ADMINISTRATIVE RULES RELEVANT TO GUIDE LICENSES

To better understand the arguments presented in this matter, it is useful to review the statutes and administrative rules pertaining to a guide's license in effect at the time

REPLY BRIEF: 1

that the Settlement Agreement was signed. Overall, the purposes of the IDAPA rules are “[t]o establish uniform standards for licensing outfitted and guided activities in Idaho in order to protect, enhance, and facilitate management of Idaho's fish, wildlife, and recreational resources.” IDAPA 25.01.01.001.02 (3/1/86). The following is a summation of the statutes and related rules regarding a guide’s license, issuance of a guide’s license, amendment of a guide’s license, revocation or suspension of a guide’s license and terms of probation for violation of IOGLB rules and regulations in effect at the time the Settlement Agreement was signed.

GUIDE LICENSE

- A guide license is valid from the date issued and expires March 31 of the following year. I.C. § 36-2109(a), IDAPA 25.01.01.015.01.c (03/20/04).
- A guide license issued by the Board shall specify all activities for which a guide is qualified to guide and shall indicate the outfitter(s) who signed the guide license application as the employing outfitter(s); and identify such limitation(s) or qualification(s) as may be imposed by the Board in issuance of said license. IDAPA 25.01.01.007 (10/15/88).
- To be licensed, a guide must be employed by a licensed outfitter and his guiding privileges are restricted to the outfitter’s operating areas. IDAPA 25.01.01.032 (10/15/88).
- A guide must meet all general requirements for a guide, and any specific requirements unique to his specialized field and any other requirements that appear on the application. IDAPA 25.01.01.033 (3/1/86).

GUIDE’S APPLICATION OBLIGATIONS

- A guide license may be submitted at any time during the year. IDAPA 25.01.01.015.d (3/20/04).
- The guide must submit an application on the form provided by the board. I.C. § 36-2108(a), IDAPA 25.01.01.013 (10/3/73).
- The application must be signed by the applicant. I.C. § 36-2108(a)(2).
- The application must be endorsed by the outfitter(s) by whom the applicant will be employed. I.C. § 36-2108(a)(2).
- If the application is not complete, the guide must pay a resubmittal fee. IDAPA 25.01.01.015.07 (3/16/04).

GUIDE LICENSE AMENDMENT

- Once the guide licensing fee is paid, the guide license can be amended to include more than one (1) outfitter. IDAPA 25.01.01.015.05.d (4-11-06).
- The amendment is processed on an amendment request form promulgated by the Board. IDAPA 25.065.02 (4/5/00).

GUIDE'S FINANCIAL OBLIGATIONS IN ALL LICENSING PROCESSES

- Pay license, penalty, amendment or application fee. I.C. § 36-2108(d), IDAPA 25.01.01.015.5 (4/11/06).

BOARD'S RESPONSIBILITY IN GUIDE LICENSING PROCESS

- Conduct such additional investigation and inquiry relative to the guide applicant and his qualifications as it shall deem advisable in the exercise of its discretion. I.C. § 36-2108(c).
- On a guide license renewal, make a decision not later than the end of the license year in which the board receives all materials required to be submitted in order to complete a license application or ninety (90) days from the date the board receives all such materials, whichever is later. I.C. § 36-2108(c).
- Issue a guide license valid for the date issued and expiring March 31 of the following year to any guide applicant who has filed an application in proper form with the board. I.C. § 36-2109(a).
- In approving and/or licensing any guide's activity, the board shall consider the following matters, among others:
 1. The length of time in which the applicant has operated in that area;
 2. The extent to which the applicant is qualified by reason of experience, equipment or resources to operate in that area;
 3. The applicant's previous safety record; and
 4. The accessibility of the area, the particular terrain and the weather conditions normal to that area during the guide's season.I.C. § 36-2109(b).
- No license shall be issued by the board until a majority thereof has reported favorably thereon; except an application for a guide license identical to a guide license held during the previous year may be issued on approval by one (1) board member provided there is no adverse information on file regarding the applicant. I.C. § 36-2109(d).
- The board shall refuse a guide license to an applicant who the board finds is not a competent person of good moral character, less than eighteen (18) years of age and does not possess a working knowledge of the game and fishing

laws of the state of Idaho and the regulations of the United States forest service. I.C. § 36-2109(c).

- The board may refuse to grant a guide's license to any applicant for violation of any of the provisions specified in title 36, chapter 21 as grounds for revocation or suspension of a guide's license. I.C. § 36-2109(c). Provided however, the Board may grant a license to an applicant with convictions of violations enumerated in I.C. § 36-2113(a) which are less than or over five (5) years old and may or may not place the licensee on probation. IDAPA 25.01.01.064.02.a and b (3-30-01). (The grounds for revocation under I.C. § 36-2113(a) are enumerated in the revocation section below.)
- The Board may require a guide applicant who has never held a guide license and who has been convicted of a violation of local, state, or federal law to appear before the Board. IDAPA 25.01.01.010.01 (3-1-86).
- If the application is denied, the board shall notify the applicant, in writing, of the reasons for such denial within ten (10) days and if the applicant shall correct, to the satisfaction of the board, such reasons within thirty (30) days of receipt of such notice and if, thereafter, a majority of the board concur, the board may issue a license to the applicant. I.C. § 36-2109(c).
- When a guide license holder is convicted of a violation of local, state, or federal law, the Board will examine the nature of the violation and the circumstances in determining whether or not a hearing shall be held for the purpose of restricting, suspending or revoking the guide license or imposing an administrative fine for any violation. Any such violator may be required to appear before the Board before a license will be issued for the following year. IDAPA 25.01.01.010.03 (3-1-86).

GUIDE LICENSE REVOCATION

- Every guide license shall be subject to suspension, revocation, probation or other restriction by the board for the commission of any of the following acts:
 1. For supplying false information or for failure to provide information required to be furnished by the license application form for a license currently valid or for other fraud or deception in procuring a license under the provisions of this chapter.
 2. For fraudulent, untruthful or misleading advertising.
 3. For conviction of a felony.
 4. For two (2) or more forfeitures of any deposits of money or collateral with a court or administrative agency or for a conviction for violation of regulations of the United States forest service or the bureau of land management.
 5. For unethical or unprofessional conduct as defined by rules of the board.
 6. For conviction of any violation of any state or federal fish and game or outfitting and guiding laws.
 7. For a substantial breach of any contract with any person utilizing his services.
 8. For willfully (i) operating in any area for which the licensee is not licensed, or (ii) engaging in any activity for which the licensee is not licensed.

9. For the employment of an unlicensed guide by an outfitter.
10. For inhumane treatment of any animal used by the licensed outfitter or guide in the conduct of his business which endangers the health or safety of any guest or patron or which interferes with the conduct of his business.
11. For failure by any firm, partnership, corporation or other organization or any combination thereof licensed as an outfitter to have at least one (1) licensed outfitter as designated agent conducting its outfitting business who meets all of the qualifications and requirements of a licensed outfitter.
12. For the failure to provide any animal used by the licensed outfitter or guide in the conduct of his business with proper food, drink and shelter, or for the subjection of any such animal to needless abuse or cruel and inhumane treatment.
13. For failure of an outfitter to serve the public in any of the following ways:
(i) by nonuse of license privileges as defined by rules of the board, (ii) by limiting services to any individual, group, corporation or club that limits its services to a membership, or (iii) by not offering services to the general public.
14. For violation of or noncompliance with any applicable provision of this chapter, or for violation of any lawful rule or order of the outfitters and guides board.

I.C. § 36-2113(a).

- Proceedings for the revocation or suspension of a guide license may be taken upon information and recommendation of any person.
 1. All accusations must be made in writing and signed by a person familiar therewith and submitted to the board.
 2. The board, acting as a board, or through its executive director, shall make a preliminary investigation of all facts in connection with such charge.
 3. The board in its discretion may either decide to take no further action and the results of such investigation shall be subject to disclosure according to chapter 3, title 9, Idaho Code, or the board may decide to initiate proceedings to suspend or revoke the license of the outfitter or guide against whom a complaint has been filed, in which case the board shall set a time and place for hearing as provided in chapter 52, title 67, Idaho Code.
 4. Notice of such hearing shall be given to the licensee against whom a citation or formal complaint has been filed not later than one hundred eighty (180) days after the filing of such citation or formal complaint.
 5. If, after full, fair and impartial hearing, the majority of the board shall find the accused has committed the violations alleged, the board may suspend the license for a period not to exceed one (1) year, or the board may order the license revoked. The board shall forthwith suspend or revoke such license in accordance with and pursuant to its order under the procedure established in chapter 52, title 67, Idaho Code.

I.C. § 36-2114.

GUIDE PROBATION AND PENALTIES

- In addition to suspension, probation, restriction or revocation of a license, the Board may impose penalties as set forth in an adopted schedule. IDAPA 25.01.01.068.01 (3/30/2001).
- The standard or usual terms of probation are that there be no violations of local, state or federal laws or ordinances, and that no amendments to the license will be permitted during the term of probation. Probation may also include such other restrictions as the Board shall order. IDAPA 25.01.01.068.03 (3/23/98).

GUIDE APPEAL RIGHTS

- Any person aggrieved by any action of the board in denying the issuance of or in the suspension or revocation of a guide's license may proceed as provided in chapter 52, title 67, Idaho Code. I.C. § 36-2115.
- An agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of title 67, chapter 52. I.C. § 67-5254(1).
- When a licensee makes timely and sufficient application for the renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and in the case of denial or limitation of the new license, until the time to appeal has expired. I.C. 67-5254(2).

III. REBUTTAL ARGUMENT

A. IOGLB Misinterprets the Settlement Agreement

IOGLB centers its entire argument on appeal regarding the interpretation of the Settlement Agreement on the premise that an outfitter license includes a guide license. Contrary to IOGLB's representation, a guide license and an outfitter license are two separate licenses. The acquisition of an outfitter license does not automatically result in the issuance of a guide license.

Based upon the statutes and administrative code in effect at the time this Settlement Agreement was signed, a guide was defined as an individual who met the criteria as set forth in Idaho Code 36-2102(c), and met the required qualifications as

prescribed in the administrative rules to provide professional guided services to clientele in the pursuit and conduct of licensed activities. IDAPA 25.01.01.002.18 (4-1-92). A guide license was a license issued by the Board to an individual who was employed by a licensed outfitter to furnish personal services for the conduct of outdoor recreational activities as defined in Idaho Code § 36-2102(c). IDAPA 25.01.01.002.19 (4-1-92).

Unlike a guide, an outfitter may be an entity. An outfitter was defined as an individual, corporation, firm, partnership, or other organization or combination thereof that met the criteria as set forth in Idaho Code § 36-2102(b), and further met the required qualifications as prescribed in the administrative rules to conduct an outfitting business in Idaho. IDAPA 25.01.01.002.34 (4-1-92). An outfitter license was defined as a license issued by IOGLB to an individual, partnership, corporation, or other duly constituted organization to conduct activities as defined in Section 36-2102(b), Idaho Code. IDAPA 25.01.01.002.35 (3-15-02). An outfitter can also act as a guide if he possesses the qualifications of a guide as determined by the Board. A person can secure both an outfitter license and a guide license. IDAPA 25.01.01.004.01 (10/15/88). Contrary to IOGLB's position on appeal, a sole proprietor outfitter is not automatically licensed as a guide for his outfitting business. Rather, he must acquire a guide license.

Further, nothing in the outfitter and guide statutes prohibit an outfitter who has a guide license from being employed to guide for other outfitters. Idaho Code § 36-2108(a)(2) specifically recognizes that a guide may be employed by more than one outfitter.

Under the terms of the Settlement Agreement, Podsaid was authorized to guide for another outfitter, Bitterroot Mountain Outfitters. Podsaid was placed on probation as

a guide, and was prohibited from making any guide license amendment request during his period of probation. R p. 20, Clause 9.

In a subsequent and separate clause of the Settlement Agreement, Clause 10, Podsaid was issued a separate restricted probationary sole proprietorship outfitter license for AW-Outfitters, including the right to employ himself as a guide, as set forth in the clauses following Clause 10. R p. 20. Clause 11 provided that Podsaid's outfitter license would be effective from the date of issuance with restrictions. R p. 21. Clause 12 provided that Podsaid could seek licensure as an outfitter from April 1, 2008 through December 31, 2008, and upon receipt of a complete and valid license renewal application, the Board shall issue an outfitter's license effective from April 1, 2008 through December 31, 2008, subject to the same restriction in Clause 11(c). Clause 13 provided that if AW-Outfitters did not sell on or before December 31, 2008, the outfitter license terminated and the Board would treat the outfitter area as vacated and open the area for licensing to other outfitters. This clause also provided that if Podsaid sought an extension of the outfitter license beyond December 31, 2008, the Board would only grant an extension of the outfitter license if it was for the sole purpose of selling the outfitter business. R p. 22.

The Settlement Agreement specifically addressed the two distinctly different licenses for Podsaid, one being a guide license and one being an outfitter license. The only license that included a termination date of December 31, 2008 was the outfitter license. Further, the communications from Podsaid's former counsel, Barry McHugh, to IOGLB's former counsel, Steve Scanlin, clearly demonstrates that the Settlement Agreement contemplated Podsaid would be issued a guide license expiring March 31, 2009 rather than Podsaid relinquishing his guide license privileges effective December

31, 2008 as argued by IOGLB. In the list, item number 4, entitled "Guide License", McHugh clearly proposed: "The license would be issued on a probationary status ending March 31, 2009." The outfitter license was negotiated as a separate matter in the proposed settlement. R pp. 001-003.

Although IOGLB argues on appeal that the early expiration of December 31, 2008 for Podsaid's guide license was an express term of the Settlement Agreement, it did not originally take this position. One correspondence in the record from IOGLB's legal staff informs Podsaid's former counsel that the expiration date of December 31, 2008 for Podsaid's guide license was an implicit term of the Settlement Agreement, as opposed to the express term of the Settlement Agreement that IOGLB now argues. R p. 048.

Further, the agency's actions with respect to the guide license are consistent with a view that it was separate and intended to expire on March 31, 2009. On April 11, 2008, Podsaid was issued a renewal guide license with an expiration date of March 31, 2009. R p. 029. Had IOGLB interpreted the Settlement to limit Podsaid's guide license under the terms of the Settlement Agreement to a termination and surrender of guide licensing privileges effective December 31, 2008, rather than an expiration date of March 31, 2009, it would not have issued a renewal with an expiration date of March 31, 2009.

On appeal, IOGLB argues that if Podsaid sought an extension of his outfitter license beyond December 31, 2008, the Board would only grant the extension for the sole purpose of selling the outfitter business pursuant to the terms of the Settlement Agreement. However, the issue on appeal is not what the Board would have done had Podsaid requested an extension of the outfitter license. The issue on appeal is the Board's action with respect to Podsaid's guide license.

IOGLB acknowledges on appeal that on June 26, 2008 the Board considered a request from Podsaid to approve the sale of his outfitting business to Darren Thorne consistent with the terms of the Settlement Agreement. IOGLB argues on appeal that in conjunction with Podsaid's request to approve the sale of his outfitting business, it entertained a motion allowing an amendment to Podsaid's guide license to allow Podsaid to guide for Thorne as his employing outfitter and terminating his guide license effective December 31, 2008, consistent with the Board's prior disciplinary order. R p. 063. However, there is no executed disciplinary order in the record. There is an unsigned order. R pp. 024-028. The only binding document in the record regarding Podsaid's guide license is the Settlement Agreement, which terms control the matter before this Court on appeal.

An actual guide license amendment request is not contained in the record. However, there are correspondences in the record referencing a guide license amendment request by Podsaid to amend the license to reflect Thorne was his employing outfitter, but the record on appeal appears to be incomplete because it does not contain Podsaid's actual guide license amendment request.

Regardless, the record demonstrates that IOGLB had before it a request to approve a sale of Podsaid's business. R pp. 030-052. This sale was mandated by the terms of the Settlement Agreement. It also terminated Podsaid's outfitter license consistent with the terms of the Settlement Agreement. (R. p. 060-063.)

The Board also considered an amendment request to change Podsaid's employing outfitter to Thorne. However, inconsistent with the Settlement Agreement and the previously issued guide license, the Board terminated Podsaid's guide license effective December 31, 2008.

Although the Board wishes to characterize its actions as an “amendment” to Podsaid’s guide license consistent with the Settlement Agreement, the Board’s action was a termination and revocation of Podsaid’s license. Contrary to its position before this appeal that this authorization was implicit to the agreement, IOGLB contends in its response to this appeal that Podsaid expressly agreed to relinquish his guide license privileges effective December 31, 2008. No such term appears in the Settlement Agreement. Further, if it is deemed that the Settlement Agreement is vague or ambiguous, it is clear from the letter from McHugh to Scanlin, the terms of the Settlement Agreement, and the actions of the agency related to Podsaid’s guide license following execution of the Settlement Agreement that the intent of the Settlement Agreement was not to terminate Podsaid’s guide license privileges effective December 31, 2008. *See generally Bream v. Benscoter*, 139 Idaho 364, 79 P.3d 723 (2003) (if the provisions of a contract are ambiguous, the interpretation of those provisions is a question of fact which focuses upon the intent of the parties); *Ramco v. H-K Contractors, Inc.*, 118 Idaho 108, 794 P.2d 1381 (1990) (the determination of the parties’ intent is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.)

B. IOGLB’s Actions are Subject to the Idaho Administrative Procedure Act

IOGLB argues that Podsaid’s guide license is not a license of a continuing nature, and therefore his reliance on I.C. § 67-5254 is misplaced. This argument is unsupported by the Outfitter and Guide statutes and the Idaho Administrative Procedures Act.

As referenced above in the section pertain to guide appeal rights, I.C. § 36-2115 provides that any person aggrieved by any action of the board in denying the issuance of or in the suspension or revocation of a guide's license may proceed as provided in chapter 52, title 67, Idaho Code. Thus, the legislature clearly expressed an intent that guide licensees be afforded the rights provided by I.C. § 67-5254 if their license was suspended or revoked. As outlined above, an amendment may be made to the employing outfitter for the guide, and it is processed by a request from the guide. No provision is found in the statutes or rules that allowed the Board to undertake the unilateral action that occurred in the present case and amend the term of the guide license to terminate it. Although IOGLB may call the action it took an "amendment" of Podsaid's guide license, in actuality it was a revocation of the license.¹ Thus, Podsaid is entitled to resort to the provisions of chapter 52, Title 67 in bringing an appeal.

In support of its argument, IOGLB argues that Podsaid's license was not one of a continuing nature because Clause 12 of the Settlement Agreement expressly provided that the parties agreed his outfitter license would terminate December 31, 2008. IOGLB argues that because Podsaid specifically agreed to a termination of his outfitter license, it necessarily included his guide license even though no such term appears in the Settlement Agreement and the language regarding the December 31, 2008 termination date is limited to the outfitter license.

In an attempt to bootstrap the guide license into the provisions of Clause 12 regarding the outfitter license, IOGLB points to testimony in this matter from the

¹ In fact, in the companion appeal filed in this matter as Shoshone County Case No. 09-440, it is clear that IOGLB intended the amendment of the termination date to act as a revocation because moving forward on Podsaid's license renewal request, IOGLB has contended that Podsaid is not a renewing licensee, but rather a first time licensee.

Executive Director that when a sole proprietor outfitter license or any outfitter license is terminated, all licenses are terminated, including guide licenses. R p. 136, l. 24 – 138, l. 24. This testimony is not supported by statute, administrative rule or law. To the contrary, the rules make it quite clear there are two separate and distinct licenses for a guide and an outfitter, and an outfitter may hold both. Nothing in the statutory scheme or the rules promulgated thereunder support the Executive Director's testimony that if one or the other license is terminated that both licenses are automatically terminated. In fact, the statutes and rules recognize that a person can be an outfitter without being a guide, a person can be a guide without being an outfitter, and a person can be both a guide and an outfitter. Further, nothing in the record supports the Executive Director's testimony that at the time the Settlement Agreement was negotiated the parties intended Clause 12 to include Podsaid's guide license even though the clause expressly addressed only the outfitter license as terminating on December 31, 2008. Further, the evidence of the facts and circumstances surrounding the execution of this agreement contradicts the Executive Director's testimony. Thus, IOGLB's claim that the parties intended Clause 12 addressing the termination of Podsaid's outfitter license effective December 31, 2008 to include Podsaid's separate guide's license is not supported by substantial and competent evidence in the record.

IOGLB also infers that the Court should overlook this matter and deem it moot because Podsaid "got what he wanted" when this Court issued a stay on the termination of his license.² IOGLB pretends to believe that the issue for Podsaid was whether he would be allowed to guide until March 31, 2009, and therefore the issue is moot. This

² In actuality, Podsaid did not guide after December 31, 2008 because he sought an amendment to his license to guide for Scott Boulanger, which the Board deemed a "new application" and did not approve, which is the subject of the companion appeal in this matter.

argument is disingenuous. The issue is larger than the period of time for which Podsaid was allowed to guide. The issue is whether he agreed under the terms of the Settlement Agreement to relinquish his guide license as well as his outfitter license effective December 31, 2008. Podsaid's future status in licensing is important because a licensee renewing a license is afforded greater rights and protections than a new applicant.

C. IOGLB Violated the Statute Relevant to Executive Sessions and Deliberated in Executive Session

IOGLB claims on appeal that its use of an executive session at the close of the public hearing, prior to deliberation, was appropriate because a board member had a legal question. It is clear from the hearing record the chairman wished to go into executive session to deliberate the matter before it. At the close of hearing, the Chairman inquired if they were legal to enter into executive session. R p. 147, L. 3-4. Podsaid objected, R p. 147, L. 10-12, to which the Chairman replied that they could either discuss the matter then (in open session) or go into executive session, but based on the June minutes he was of the opinion that the June order stood. R p. 147, ll. 13-20. The Chairman stated to the Board "If you want to discuss it now or go into executive session, that's fine." R p. 147, ll. 13-20. Board member Long indicated he had one specific legal question relevant to the case. R p. 148, L. 13-16. The Board decided to take a lunch break and upon returning after lunch to convene into executive session. R p. 149, ll. 17-19.

The version of Idaho Code § 67-2345 in effect in 2008 provided the manner for entering into executive session and the purposes for holding an executive session. The act required a two-thirds (2/3) vote recorded in the minutes of the meeting by individual vote to convene into executive session and identification by the presiding officer of the authorization under the act for the holding the executive session. The Board did not follow the statute. IOGLB contends that the Board convened into executive session

pursuant to I.C. § 67-2345(f) to permit it to consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation. Nothing in the records supports this argument.

It is clear from the record that the matter was deliberated in executive session given the fact that upon returning to the hearing the hearing officer, who is also the Board's staff attorney, "clarified" the record to place the motion and second on the record, and to place in the record some of the Board's deliberations. R p. 149 ll. 7-22. It is clear the move to executive session was done so that Podsaid (and any reviewing Court) could not know what was discussed. This procedural tactic is not allowed pursuant to I.C. § 67-2345(4).

The Board clearly violated Idaho's open meeting laws. It deliberated the matter in executive session so that it could make its decision in secret.

D. This Court has Authority to Require an Impartial Hearing Officer be Assigned on Remand

IOGLB also contends that this Court is without authority to require that an impartial hearing officer hear this matter on remand if a new hearing is ordered. IOGLB contends the Court does not have this authority because IOGLB might decide not to hold any hearings on remand. As set forth in its opening brief, in the event this Court orders a new hearing on remand, Podsaid is entitled to an impartial hearing officer. *See Johnson v. Bonner Cty. Sch. Dist. No. 82*, 126 Idaho 490, 887 P.2d 35 (1994) (holding that requiring a litigant to submit to a biased decision maker to be a "constitutionally unacceptable" violation of due process.) It is clear from the actions of the Board that it is unable to be impartial in this matter. It is also clear it is unwilling to create a record in order to hide its biases.

IV. ATTORNEY FEES

The most recent version of Idaho Code § 12-117 provides:

12-117. Attorney's fees, witness fees and expenses awarded in certain instances. (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

(2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

IOGLB is a state agency. Podsaid requested attorney fees be awarded to him on appeal. IOGLB contends that because there is no case law that determines that a guide license is a license of a continuing nature as defined by I.C. § 67-5254 that it did not act without a reasonable basis in law. This argument is specious.

Idaho Code § 67-5254 addresses licenses, which are defined to be any agency permit, certificate, approval, registration, charter, or similar form of authorization required by law, but does not include a license required solely for revenue purposes. I.C. § 67-5201(10). A guide license fits this definition. Idaho Code § 67-5254(1) indicates the license must be one of a continuing nature and discusses license renewals. Further clarification is given in I.C. § 67-5254(2), which notes that when a licensee has made timely and sufficient application for the renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency. Thus it is clear that the statute is focused upon the licensee's licensed activity, which will continue if the license is renewed, thus

making it a license of a continuing nature. A guide license clearly fits within these parameters.

However, even if IOGLB is correct that there may be a question regarding the nature of a guide license, its own statutes required it to comply with certain provisions, including those set forth in Title 36, chapter 21. Thus, any doubt that it needed to comply with these requirements were answered by its own controlling statutes.

IOGLB claims it did not act without a basis in fact or law given the language of the Settlement Agreement. This argument lacks merit. While IOGLB may have considered the Settlement Agreement to encompass the guide license, and it may have considered its issuance of a license with an expiration of date of March 31, 2009 to be in error, its own statutes established procedures for it to follow before revoking Podsaid's guide license as enumerated previously in this brief. I.C. § 32-2114. The Board was required to receive a written recommendation familiar with the facts seeking the revocation. The Board was required to make a preliminary investigation of all facts in connection with such charge. If the Board determined to move forward with the revocation process, it was required to initiate proceedings to suspend or revoke the guide license, and set a time and place for hearing as provided in chapter 52, title 67, Idaho Code. The Board was required to provide Podsaid notice of such hearing. Podsaid was entitled to a full, fair and impartial hearing, before his license was revoked. The board was required to provide it by reference to the procedures contained in chapter 52, title 67, Idaho Code. None of this happened.

Instead, the Board merely made a motion at a Board hearing to revoke the guide license. Thereafter, when its procedural faux pas was called to its attention, it proceeded on a motion to reconsider and did not correct its errors. Instead, it compounded the error

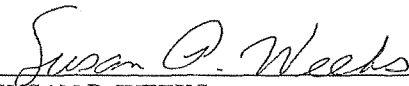
by holding illegal executive sessions and refusing to afford Podsaid the process he was due under the law. Clearly, the Board proceeded without a basis in fact or law in this matter. Podsaid is entitled to attorney fees.

V. CONCLUSION

For the foregoing reasons, the Court should reverse and remand the Board's June 25, 2008 decision, and the final order revoking the license issued following the motion to reconsider.

DATED this 29th day of March, 2013.

JAMES, VERNON & WEEKS, P.A.


SUSAN P. WEEKS
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of March, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Michael Kane
Michael Kane & Associates, PLLC
P.O. Box 865
Boise, ID 83701-2865

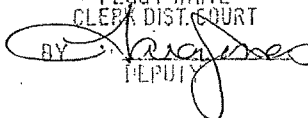
<input type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input checked="" type="checkbox"/>	Telecopy (FAX) (208) 342-2323



STATE OF IDAHO
COUNTY OF SHOSHONE/SS
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PEGGY WHITE
CLERK DIST. COURT
BY  DEPUTY

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

A.T. "SANDY" PODSAID,

Petitioner,

vs.

STATE OF IDAHO OUTFITTERS AND
GUIDES LICENSING BOARD, a state agency,

Respondent.

Case No. CV-09-440

OPENING BRIEF

I. INTRODUCTION

This matter involves an appeal of a motion taken on a license renewal made by Sandy Podsaid upon the expiration of his license which carried an expiration date of March 31, 2009. In Shoshone County Case No. CV-08-807, this Court issued an Order staying the revocation and/or modification of Podsaid's license effective December 31, 2008. On December 12, 2008, out of an abundance of caution, A.T. "Sandy" Podsaid submitted a renewal application to Idaho Outfitters and Guides Licensing Board ("IOGLB"). IOGLB determined it would treat the renewal application as a new application, which gave it latitude to consider evidence that was the subject of a pending contested case without proving the allegations in the contested case.

OPENING BRIEF: I

II. STATEMENT OF THE CASE

A. *Nature of the Case*

This appeal involves A.T. "Sandy" Podsaid's guide license renewal. IOGLB declared the renewal application to be a new license application and determined to handle it as a new license application over Podsaid's objection. IOGLB refused to treat the application as a renewal of Guide License No. 2594.

B. *Course of Proceedings and Statement of Facts*

On December 11, 2008, utilizing a form promulgated by the Board entitled "Guide License Application", Podsaid applied for a guide license renewal of Guide License No. 2594. IOGLB received the renewal application on December 12, 2008. (R., pp. 1-2.) On January 9, 2009, the Board was provided Podsaid's certified hunting guide training form and Podsaid's certified snowmobile guide training form. R. 20A. On February 9, 2009, IOGLB's attorney, Roger Hales, provided a letter to Podsaid's counsel indicating that IOGLB deemed Podsaid's renewal request an incomplete application rather than a renewal of his previous guide license. IOGLB therefore maintained the application was not affected by this Court's stay entered in Shoshone County Case No. CV-08-0807. (R., p. 454.) On February 23, 2009, Boulanger informed IOGLB that he would no longer need Podsaid's services because the hunting season was over. (Augmented Record.) On March 6, 2009, Jake Howard, Executive Director for IOGLB, informed Boulanger that a hearing scheduled for March 18, 2009, would not proceed. (R., p. 455.)

On February 13, 2009, an administrative complaint was filed by the Board's outside counsel, Kane & Associates, designated as Case No. 09-2594-04. This complaint alleged that Podsaid had violated certain advertising rules of the Board and had held

himself out as an outfitter in advertising and sought a denial of Podsaid's 2009 guide license renewal application. (R., pp. 25-50). On March 9, 2009, Podsaid timely answered the complaint. (R., pp. 51-57.) Podsaid also filed a motion to dismiss or limit evidence at the hearing on the grounds that the Board had failed to comply with Idaho Code § 36-2114 in filing the complaint. (R., pp. 636-639.) To this date, the contested case has never been processed. The matter of whether Podsaid violated IOGLB's advertising rules remains adjudicated in this contested case, even though it's been nearly three years since it was filed.

On March 30, 2009, Podsaid submitted another application for renewal. (R., pp. 3-6.) On April 30, 2009, Howard wrote Podsaid, indicating that the application was a complete application, and that Howard would be deferring the application to the Board for decision pursuant to IDAPA 25.01.01.064(d). (R., pp. 456-457.) Enclosed with the letter was a Notice of Hearing. The notice indicated IOGLB had scheduled a hearing for June 17, 2009 for the purpose of conducting an examination of the applicant to ascertain the qualifications of Podsaid as a new applicant for a guide license. The notice further indicated that pursuant to IDAPA 25.01.01.0674(d), the Executive Director would be referring the guide license application to the Board for action. The notice further advised the issues to be discussed would be whether the applicant should be denied a license or whether such license should be issued subject to restrictions and/or limitations. The Notice also indicated that the basis for the examination was to determine if Podsaid was a competent person of good moral character pursuant to I.C. §§ 36-2107, 36-2108 and 36-2109, 36-2113, 36-2114 and 67-5254. Also enclosed with the notice was an Analysis and Recommendation for Board Agenda Items. Included in the accompanying documents were the meeting minutes from the June 26, 2008 Board meeting at issue in the first

appeal; the meeting minutes from the December 8, 2008 meeting at issue in the first appeal and the Settlement Agreement and related documents from the August 2007 settlement. Also included was the administrative advertising complaint, which to this day has not proceeded forward with a contested case hearing, despite the answer and denial of these charges. (R., pp. 11-197.)

The analysis acknowledged Podsaid had appealed the Board's 2008 modification/revocation of his license, which action was pending before this Court, and acknowledged that this Court had stayed the Board's action. However, the memorandum concluded that the stay granted by this Court expired on March 31, 2009. (Memorandum at Page 5)(R., p. 15.) The Memorandum concluded "The appeal is pending before Judge Gibler, but may be moot as the relief sought was a license through March 31, 2009, which time has passed." (R., p. 15.)

Further, the Memorandum clearly indicates that a measure of punitive action is being taken against Podsaid for appealing the Board's decision and disagreeing with the Board's interpretation of the agreement and an attempt is being made to avoid the requirement of processing the matter as a renewal to avoid a contested case. Following a history of the settlement agreement as seen by the Executive Director, the Memorandum informed the Board: "Mr. Podsaid has now sought licensure with Scott Boulanger for the following activities: snowmobiling and hunting. Mr. Podsaid's situation is unusual. When he sold his outfitter business he gave up his sole proprietorship license, which included both an outfitter and a guide license. Mr. Podsaid may contend that the current application is merely a modification or amendment to his existing guide license and that the consent agreement from August 2007 was not meant to place any restrictions on his guide license, but only on his outfitter license. However, rather than seeking to guide for

complaint (R., p. 8, L. 23 – p. 9, L. 17.) Kane informed the Board that the notice of hearing was merely to give Podsaid notice that the Board was considering his license application, Kane stated:

The law on your application process is this: You have an application. You review it. You then make a determination shall we grant this license or not. If the answer is, no, we're not going to grant the license, then the person who has been denied the license has 21 days to ask for a hearing, Okay.

(Tr., p. 9, L. 18-23.)

Kane then presented the Memorandum he had prepared as an enforcement attorney for IOGLB regarding advertising and claiming that Podsaid had violated the Board's advertising rules (which was the issue that remained pending in the contested case that was never adjudicated). (Tr. p. 10, L. 25 – p. 11, L. 7.) Following the presentation of the memorandum, Kane informed the Board: "So the question that's sort of out there is when we're looking at Mr. Podsaid's March 30th application – March 30th of 2009 – is that a new application or is that a continuing application. **And the reason that's important is that the rules are somewhat different.**" (Emphasis added.)(Tr., p. 11, L. 8-12.) Kane then continued:

The rules are somewhat different. Generally, to kind of state the rules, if it's a continuing application, let's say less scrutiny goes into it, and certainly you can't talk about things that have already been decided and they're over, like, for example, all of the things that happened with Mr. Podsaid back in 2006, 2007, 2008. He's already paid his price for that would be his argument. I'll talk about what those things are in a minute. But having said that, you certainly can, even in a continuing application situation, talk about new violations that are ongoing like the Internet stuff. So that's why I'm giving you this – this memo.

(Tr. p. 11, L. 25- p. 12, L. 1.)

Kane then advised the Board to review the application and materials in executive session. (Tr., p. 13 L. 15-18.) Kane then argued to the board extensively that Podsaid's internet advertising violated Board rules. (Tr. p. 15, L.

14 – p. 21, L. 18.) The Board’s attorney also informed the Board it had to limit its decision on the license application to what was being presented by the prosecutor. (R., p. 22, L. 20 – p. 23, L. 4) Further, the Board was presented documents that were admitted into the record as evidence, including all of the advertising matters. (Tr., p. 26.) No further record was provided by the agency.

The Board minutes reflect that the Board convened into executive session at 2:20 p.m to discuss legal ramifications and options concerning pending or likely litigation with Board attorney Roger Hales in accordance with I.C. § 67-2345(1)(f). The executive session ended at 3:05 p.m. with no decision made. Immediately thereafter, a motion was made to grant the application with restriction, which motion failed to pass. Another motion was made to deny the guide application based upon his misleading advertising in violation of the Board’s laws and rules as established by the record of the hearing before the board and based upon his prior discipline by the Board and based upon the settlement agreement dated August 10, 2007. (R., pp. 204-205.)

On June 24, 2009, Hale informed Podsaid’s counsel of the Board’s determination regarding his license. (R., p. 210-211.) By letter dated June 24, 2009, but sent July 15, 2009, to preserve his administrative rights, Podsaid appealed. This appeal was done without wavier of the objections lodged by Podsaid as to procedural and notice deficiencies in the process and without waiver of the objections raised by Podsaid’s June 15, 2009 letter. (R., p. 212-213.) On July 22, 2009, Podsaid filed the present complaint.

On August 31, 2009, Kane wrote Podsaid’s counsel and indicated that the Board determined to handle its recent “hearing” as a new license application. (R., p. 446-447.)

The Board scheduled a hearing for September 18, 2009 on the matter. The matter was continued at the request of Podsaid. (R., pp. 439-440.) Another hearing was scheduled for December 4, 2009. (R., pp. 644-645.)

III. ARGUMENT

A. *Standard of Review*

Idaho's Administrative Procedures Act, I.C. §§ 67-5270 to – 5279 controls the review of this matter. The scope of review is provided for in I.C. § 67-5279, which provides:

Scope of review -- Type of relief. (1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(2) When the agency was not required by the provisions of this chapter or by other provisions of law to base its action exclusively on a record, the court shall affirm the agency action unless the court finds that the action was:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure; or
- (d) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole;

or

- (e) arbitrary, capricious, or an abuse of discretion.

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.

(4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

The applicable legal standard in an appeal without exhaustion of administrative remedies has been discussed in numerous cases. In *Bohemian Breweries v. Koehler*, 80

Idaho 438, 446-448, 332 P.2d 875 (1958), this Court set forth the rule of exhaustion of administrative remedies as follows:

While as a general rule administrative remedies should be exhausted before resort is had to the courts to challenge the validity of administrative acts, such rule is not absolute and will be departed from where the interests of justice so require, and the rule does not apply unless the administrative agency acts within its authority.

"The doctrine of exhaustion of administrative remedies affords no rigid rule applicable indiscriminately in each and every situation where a party resorting to a court has failed to exhaust an available administrative remedy, but is subject to some limitations which, however, are not susceptible of exact definition. One line of cases representing such a limitation on the doctrine turns on the nature of the defect urged by a party as ground for judicial relief from action, threatened or completed, by an administrative authority of first instance in the administrative machinery; another line of cases turns on the futility of exhausting the administrative remedy."

See also: *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772; *Ogden City v. Armstrong*, 168 U.S. 224, 18 S.Ct. 98, 42 L.Ed. 444.

The Supreme Court has further expanded on this concept as noted in *Sierra Life Insurance Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068 (1978):

In *Grever v. Idaho Tel. Co.*, 94 Idaho 900, 499 P.2d 1256 (1972), this Court further defined the exceptions to the exhaustion doctrine:

In relaxing the doctrine of exhaustion this Court held that the rule will be departed from under certain circumstances, first, where the interests of justice so require and secondly, where the agency acts outside its authority.

Id. at 903, 499 P.2d at 1259; see also *Bohemian Breweries v. Koehler*, 80 Idaho 438, 332 P.2d 875 (1958) (exhaustion of administrative remedies not an absolute rule and will be departed from where the interests of justice so require); *Williams v. State*, 95 Idaho 5, 501 P.2d 203 (1972) (deviation from rule allowable when interests of justice would otherwise be thwarted).

It is difficult to find truly analogous cases dealing with the defense of failure to exhaust administrative remedies because of (1) the extremely

varied nature of the administrative proceedings and remedies involved; (2) the variations in the nature of the judicial relief or remedy sought which brings the judicial and the administrative proceedings into conflict; and (3) the variations in the manner in which the exhaustion doctrine defense is raised procedurally.

B. Applicable Law

Title 36, Chapter 21, Idaho Code provides for the licensing of outfitters and guides in Idaho. An outfitter and a guide are each separately defined, engage in separate activities and have separate licenses. An outfitter is deemed to include persons who advertise or hold themselves out to the public for hire; provides facilities and services for hire; and leases or uses equipment or accommodation for compensation for outdoor recreational activities related to hunting and fishing. (I.C. § 36-2102(b)). A guide is considered to be any natural person who is employed by a licensed outfitter to furnish personal services for the conduct of outdoor recreational activities directly related to the conduct of activities for which the employing outfitter is licensed. (I.C. § 36-2102(c)). Any license issued to an outfitter or any license issued to a guide may be suspended or revoked for the reasons set forth in I.C. § 36-2113. The procedure to be followed for suspension or revocation of a license is set forth in I.C. § 36-2114, and requires a fair and impartial hearing before licensing action is taken against a licensee. Idaho Code § 36-2115 provides that any person aggrieved by any action of the board in denying the issuance of or in the suspension or revocation of an outfitter's or guide's license may proceed as provided in chapter 52, title 67, Idaho Code. Further, I.C. § 36-2119(a) mandates that all rules and orders be made in accordance with chapter 52, title 67, Idaho Code.

In the administrative rules adopted pursuant to Title 36, outfitters are defined the same as the statute (IDAPA 25.01.01.002.34), and so are guides (IDAPA

25.01.01.002.18). Licenses for outfitters (IDAPA 25.01.01.002.35) are handled separate from the licenses for guides (IDAPA 25.01.01.002.19). Each type of license carries its own requirements. (IDAPA 25.01.01.004).

Idaho Code § 67-5201(6) defines a contested case to mean a proceeding which results in the issuance of an order. Idaho Code § 67-5240 expands this definition and says it is any proceeding by an agency, other than the public utilities commission or the industrial commission, which may result in the issuance of an order by the agency is a contested case and is governed by the provisions of this chapter of the code, unless otherwise provided by law.

Idaho Code § 67-5240 establishes the procedures to be utilized by the agency when a license is involved. The portions relevant to the present appeal provide:

AGENCY ACTION AGAINST LICENSEES. (1) An agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute.

(2) When a licensee has made timely and sufficient application for the renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by a reviewing court.

Finally, Idaho Code § 67-5242 sets forth the procedures to be utilized for the hearing of a contested case. The statute requires the following:

PROCEDURE AT HEARING. (1) In a contested case, all parties shall receive notice that shall include:

- (a) a statement of the time, place, and nature of the hearing;
- (b) a statement of the legal authority under which the hearing is to be held; and
- (c) a short and plain statement of the matters asserted or the issues involved.

(2) The agency head, one (1) or more members of the agency head, or one (1) or more hearing officers may, in the discretion of the agency head, be the presiding officer at the hearing.

(3) At the hearing, the presiding officer:

(a) Shall regulate the course of the proceedings to assure that there is a full disclosure of all relevant facts and issues, including such cross-examination as may be necessary.

(b) Shall afford all parties the opportunity to respond and present evidence and argument on all issues involved, except as restricted by a limited grant of intervention or by a prehearing order.

(c) May give nonparties an opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.

(d) Shall cause the hearing to be recorded at the agency's expense. Any party, at that party's expense, may have a transcript prepared or may cause additional recordings to be made during the hearing if the making of the additional recording does not cause distraction or disruption.

(e) May conduct all or part of the hearing by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place.

Under the authority of Title 67, Chapter 52, the Idaho attorney general has adopted the Idaho Rules of Administrative Procedure of the Attorney General. (IDAPA 04.11.01). Unless an agency opts out of these rules, they control the administrative procedures of the agency. (IDAPA 04.11.01.003). IOGLB has not opted out of these rules.

A contested case is simply defined by the rules as one which results in a rule or an order. (IDAPA 04.11.01.005.06). An order is defined as an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons. (IDAPA 04.11.01.005.12). Rules 104-199 of IDAPA 04.11.01 establish the various mechanisms for bringing forth a contested case. Rule 104 provides that formal proceedings must be initiated by a document (generally a notice, order or complaint if initiated by the agency) or another pleading listed in Rules

210 through 280 if initiated by another person. The rules contemplate that there will be pleadings setting forth the position of the parties. (Rules 210-299). Rule 550 (IDAPA 04.11.01.500) requires that following the exchange of pleadings, discovery, motions and a pre-hearing conference that the matter will be set by a hearing officer for hearing. Following the hearing, a written preliminary order is issued. (Rule 730). The preliminary order must be accompanied by a document with specific information listed as required by Rule 730 which contains information regarding finality of the order and review of the order.

C. Alleged Errors

This Court previously stayed the Court's decision to terminate Podsaid's Guide License No. 2594. Thus, Guide License No. 2594 continued in effect until March 31, 2009. Podsaid made timely and sufficient application for renewal before March 31, 2009. The issue in this appeal is the determination by IOGLB to treat the renewal application for Guide License No. 2594 as a new application because Podsaid's license renewal contained a different designated outfitter. As acknowledged by Kane in the Board's license examination proceeding, if the application is a renewal license, the agency may not refuse to renew the license if Podsaid made timely and sufficient application unless the agency first gives Podsaid notice and an opportunity for an appropriate contested case in accordance with the provisions of Title 67, Chapter 52. However, a new application has different procedures that are used.

The agency in this matter claims it acted appropriately pursuant to IDAPA 25.01.01.064(d), which gives the Executive Director the right to defer any licensing matter to the Board. IDAPA 25.01.01.064.02 allows the Board to grant a license, deny a

license or grant a license with conditions. However, this IDAPA rule does not change any other standards that apply to IOGLB.

As noted above, the Board determined it would “examine” Podsaid in a public hearing. This IDAPA does not authorize an “examination” of a guide licensee’s renewal application in the context of a procedure initiated by a Notice of Hearing. In fact, even if this were a new application as claimed by IOGLB, there was no rule allowing for either written or oral examination of a guide applicant in the initial application for a guide license.

The power of the Board to conduct examinations is contained at I.C. § 36-2107. The Board has the power to conduct examinations to ascertain qualification of applicants for guide licenses. I.C. § 36-2107(a). It also has the power to prescribe and establish rules of procedure to carry into effect the provisions of this chapter including, but not limited to, rules prescribing all requisite qualifications of training, experience, knowledge of rules of governmental bodies, condition and type of gear and equipment, examinations to be given applicants, whether oral, written or demonstrative, or a combination thereof. I.C. § 36-2107(b). Finally, it has the power to conduct hearings and proceedings to suspend, revoke or restrict the licenses of guides, and to suspend, revoke or restrict said licenses for due cause in the manner provided. I.C. § 36-2107(c).

However, it does not have the power to make up procedures as it goes and ignore rules. It can’t file contested cases, and then ignore it because it fears it will lose, yet request that the Board use the facts of the unresolved contested case in its decision making process on a licensing application. It can’t convert a license renewal application into a new license application for the purpose of having the board utilize the contested case facts in its decision making without proving its allegations in the contested case. It

can't issue a notice of hearing for "examination" of a license applicant. It can't avoid affording an applicant a fair and impartial hearing on a license renewal.

The statutes are clear. There is a distinct difference between the power of the Board to require an examination of new applicants, which examination procedure must be laid out in rules prescribed by the Board and what occurred in this case. Without any rule prescribing the procedure used, the Board issued a Notice of Hearing for "examination" of the licensee. It did not initiate a fair and impartial hearing process for a licensee of a continuing license. It is clear from the facts in the record that this irregularity in proceedings was followed to afford the Board the ability to consider the allegations of the contested case and utilize them in its decision without the necessity of IOGLB proving such violations in the contested case.

The procedural rules adopted by the Board pursuant to the power delegated it are found in Chapter 25, Title 1, Chapter 1 of the Idaho Administrative Procedure Act Rules (IDAPA 25.01.01). These rules specifically address the examination of applicants. IDAPA 25.01.01.020 addresses examination of outfitters and requires that all new applicants applying for an outfitter or designated agent license will be required to take a written and/or oral examination on the Act, the Rules, and general outfitting procedures. Criteria for the evaluation of a new applicant outfitter are set forth at IDAPA 25.01.01.021. Renewals for an outfitter do not require an examination. IDAPA 25.01.01.025.

In sharp contrast to these specific rules for outfitters, guides have no similar requirements. To constitute a complete application under the rules, the guide applicant must use the form provided by the Board and it must contain an affidavit from the employing outfitter that the guide will possess a valid first aid card before working and a

signed certification from the outfitter that the guide is qualified; has extensive firsthand knowledge of the operating area; if land based, understands maps and GPS systems and is clean and well mannered. IDAPA 25.01.01. 034. If it is a new applicant hunting guide, the outfitter must also certify the applicant has been in the outfitter's area for at least 10 days and has knowledge of terrain and game trails and can properly cape an animal and direct clients on the care for the meat. IDAPA 25.01.01.035.3. Thus, there was no authority to hold a hearing for the purpose of "examining" Podsaid on his license renewal application.

Further, nothing contained in IDAPA 25.01.01 allows the Board to avoid a contested case by incorporating it into a licensing "examination." As can be seen from the record, the Board based its decision in part on the contested case complaint denied by Podsaid for which no hearing has ever been held.

Finally, the action was taken considering IOGLB's interpretation of the settlement agreement, which is the subject of appeal in this matter. Thus, the decision of the Board was influenced in part by a decision that this Court may determine was not appropriate on appeal.

It is futile for Podsaid to pursue the administrative remedies available to him. The issue is one of the agency's statutory authority regarding its handling of Podsaid's renewal license application. Rather than timely proceeding to a contested case hearing as required by Chapter 52, Title 67, IOGLB reinterpreted the renewal application to allow it to avoid the provisions of providing a fair and impartial hearing. The agency attempted to ambush Podsaid by having him attend an "examination" which was actually an adjudication of the advertising contested case.

As noted in *Cooper v. Bd. of Prof I Discipline of Idaho State Bd. of Med*, 134 Idaho 449, 454, 4 P.3d 561, 566-567 (2000):

The holder of a professional license has a valuable property right protected by the safeguards of due process. *H & V Eng'g, Inc. v. Idaho State Bd. of Prof'l Eng'rs*, 113 Idaho 646, 649, 747 P.2d 55, 58 (1987); see also *Abrams v. Jones*, 35 Idaho 532, 543, 207 P. 724, 726 (1922). In order to satisfy due process, the complaint must specify the particular acts of unprofessional conduct alleged. *Abrams*, 35 Idaho at 544, 207 P. at 726. The professional is not required to defend against or explain any matter not specified in the charges. *Id.* at 545, 207 P. at 726 (citing *In re Baum*, 32 Idaho 676, 687, 186 P. 927, 931 (1920)). IDAPA also requires "a short and plain statement of the matters asserted or the issues involved." I.C. § 67-5242(1).

As further stated by the *Cooper* Court: "It is elementary that in any judicial or quasi-judicial proceeding, a pleading in the nature of an accusation or complaint must contain positive statements of the essential facts, and that it is insufficient where it merely states conclusions.... [The defendant] was entitled ... to have the charges set out specifically, in order that he might have time and opportunity to prepare his defense." *Abrams*, 35 Idaho at 544, 207 P. at 726." *Id.* Further, the *Cooper* Court held: "Because the Board did not provide Cooper with specific notice of all charges brought against him for which he was disciplined, it violated Cooper's due process rights." *Id.* Thus, in the present case, IOGLB violated Podsaid's due process rights.

It is in the interest of justice to allow this appeal to proceed. The agency has not processed the contested case regarding advertising in accordance with the rules, but rather has used the fact of the filing of the administrative complaint alone as a factor to deny Podsaid's licensing request. Further, the agency disregarded this Court's stay. To achieve its own objectives, IOGLB decided not to treat a renewal application as such. It has continued to consider the Settlement Agreement in making licensing decisions, even though a case is pending on appeal regarding the appropriateness of this action. Even

more alarming, the Board has engaged in an "examination" process solely applied to Podsaid, which action is a violation of due process and equal protection. This process has been designed to radically increase the expense to Podsaid as all hearings are held in Boise, Idaho, and require his travel and the attendance of his attorney in Boise, Idaho. At the same time, the Board's actions in failing to properly process as a contested hearing has prevented Podsaid from engaging in his trade to his financial injury, which injury is irreparable.

Even more troubling is the Board's conduct at the license examination. A prosecutor was present. Even though the matter was allegedly a licensing application examination, the Board took evidence from its prosecuting attorney, and had exhibits marked and entered into evidence, as though the matter were a contested case. The Board then convened into executive session for nearly an hour to discuss potential litigation. The Board then re-convened into regular session. No deliberation occurred on the record regarding Podsaid's license application. Instead, the Board immediately made motions regarding the license without any deliberation. It is clear from the record that the Board deliberated in executive session rather than discussing potential litigation as noted on the record before the Board entered into executive session. This procedural tactic is not allowed pursuant to I.C. § 67-2345(4).

Further, IOGLB's actions are not supported by substantial and competent evidence in the record. As the *Cooper* Court held:

This Court defers to an agency's findings of fact unless those findings are clearly erroneous and unsupported by substantial evidence in the record. *See Lamar Corp.*, 133 Idaho at 39, 981 P.2d at 1149; I.C. § 67-5279(3). However, this Court must look to the record as a whole, rather than referring to portions of the record in isolation. I.C. § 67-5279(3); see also *Gubler By and Through Gubler v. Brydon*, 125 Idaho 107, 110, 867 P.2d 981, 984 (1994); *Fuller v. State, Dep't of Educ.*, 117 Idaho 126, 127, 785 P.2d 690, 691 (Ct.App.1990). Evidence is substantial and competent

only if a reasonable mind might accept such evidence as adequate to support a conclusion. *See Reihner v. American Fine Foods*, 126 Idaho 58, 60, 878 P.2d 757, 759 (1994). To establish whether an agency's action is supported by substantial and competent evidence, this Court must determine whether the agency's findings of fact are reasonable. *Industrial Customers of Idaho Power v. Idaho Public Utilities Comm'n*, 1 P.3d 786, 793 (2000). Cf. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948) (stating that a finding is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

Id. at 456, 4 P.3d at 568.

The parties entered into a Settlement Agreement in this matter. The interpretation of that settlement agreement was the subject of an appeal at the time the Board decided to again rely upon it to support its decision.

Further, the parties are engaged in a pending contested case to address whether Podsaid violated IOGLB's advertising rules. Despite this pending contested case, the Board determined Podsaid violated its advertising rules and utilized that fact in its licensing examination. Use of these facts was inappropriate given the pending contested case and the decision was not supported by substantial and competent evidence because it relied upon this incompetent evidence. The substantial and competent evidence in this matter does not support the Board's action with respect to Podsaid's renewal application for Guide License No. 2594.

IOGLB's actions are contrary to I.C. § 67-5279(3) because they were not supported by substantial evidence on the record as a whole; exceeded IOGLB's statutory authority; were made upon unlawful procedure; violated constitutional or statutory provisions; and are arbitrary, capricious, and an abuse of discretion. Further, the decision prejudices Podsaid's substantial rights to a license renewal, a fair and impartial hearing, and due process of law. Finally, the Board's actions prejudiced Podsaid's substantial rights. It refused to process his guide license as a renewal, which violated his statutory

and due process rights as a licensee. It did not utilize a fair process to Podsaid's detriment. It skirted a contested hearing in violation of contested case rules. These transgressions are not moot given Podsaid's rights as a licensee to continue to renew his guide license and have any refusals or modifications to renew to be heard in a proper contested case setting.

The Court has the authority pursuant to I.C. § 67-5279(3) to set aside the agency's action and remand this matter for further proceedings. On remand, Podsaid requests that this Court order that the agency comply with the substantive and procedural statutes cited herein, including proper notices and procedures. Podsaid further requests that the Court order that the agency use a third party hearing officer to conduct any future contested case regarding his license to assure a fair and impartial hearing process.

Podsaid is entitled to an impartial hearing officer. In *Johnson v. Bonner Cty. Sch. Dist. No. 82*, 126 Idaho 490, 887 P.2d 35 (1994), the Supreme Court noted that a trial court has the authority to halt administrative proceedings "upon a showing that there is a probability that the decisionmaker will decide unfairly any issue" before it. 126 Idaho at 493, 887 P.2d at 38. The Supreme Court found requiring a litigant to submit to a biased decisionmaker to be a "constitutionally unacceptable" violation of due process. *Id.* at 493, 887 P.2d at 38. Therefore, according to the Supreme Court in *Johnson*, "upon a showing that there is a probability that a decisionmaker in a due process hearing will decide unfairly any issue presented in the hearing, a trial court may grant an injunction to prevent the decisionmaker from participating in the proceeding." *Id.* at 494, 887 P.2d at 39. Given the procedural irregularities that permeated the matter that is now on appeal before the Court, and the continuing procedural irregularities that occurred with respect

to Podsaid's guide license, Podsaid requests that the Court order any further contested hearings regarding his license be conducted by an impartial third party hearing officer.

IV. ATTORNEY FEES

The most recent version of Idaho Code § 12-117 provides:

12-117. Attorney's fees, witness fees and expenses awarded in certain instances. (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

(2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

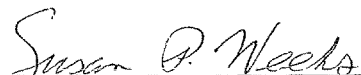
IOGLB is a state agency. Podsaid requests attorney fees be awarded to him on appeal.

V. CONCLUSIONS

For the foregoing reasons, the Court should reverse and remand the Board's determination to handle this matter as a new license proceeding.

DATED this 14th day of January, 2013.

JAMES, VERNON & WEEKS, P.A.



SUSAN P. WEEKS
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of January, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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STATE OF IDAHO
 COUNTY OF SHOSHONE / SS

FILED

this 15 day of Feb.

2013, at 4:00 clock p.m.

[Signature]
 Deputy Clerk

ATTORNEYS FOR RESPONDENT

IN THIS DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

A.T. "SANDY" PODSAID,

Petitioner,

vs.

STATE OF IDAHO OUTFITTERS AND
 GUIDES LICENSING BOARD, a state
 agency.

Respondent.

Case No. CV-09-440

RESPONDENT'S BRIEF

COMES NOW Michael J. Kane, of the firm Michael Kane & Associates, PLLC, Enforcement Attorney for the Respondent, STATE OF IDAHO OUTFITTERS AND GUIDES LICENSING BOARD (herein "Board" or "Respondent" or "Agency"), and hereby submits this Respondent's Brief.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

On December 12, 2008, Petitioner ("Podsaid") requested licensure as a guide for Mr. Scott Boulanger. (R. 1-2). On or about March 30, 2009, the Board office received an amended application for Podsaid to guide for Mr. Boulanger. (R. 3-6). The application submitted for Podsaid

RESPONDENT'S BRIEF—Page 1

to guide for the 2009-2010 license year was for a different operating area, a different employing outfitter, and included an activity for which Podsaid was not licensed in 2008 (snowmobiling). The Board provided Podsaid with notice of its decision to hold a hearing on his guide license application approximately six (6) weeks prior to the hearing. (R. 7-10).

Podsaid was further provided with a copy of the Executive Director's analysis and recommendation on the license request approximately six (6) weeks prior to the hearing. (R. 11-197). Podsaid was given an opportunity to be present, either by himself or with counsel, and to provide the Board with any written material he wished the Board to consider in his application request.

Podsaid declined to participate in the Board meeting, and instead submitted a letter from his attorney two (2) days before the Board meeting, indicating that he felt he could not receive a fair evaluation of his license request. (R. 198-200). Podsaid did not provide the Board with any written material to consider in evaluating his license application. The Board reviewed the license application and Podsaid's history during its Board meeting held June 17, 2009, and determined that Podsaid's guide license should be treated as a new application. (R. 204-205).

In a June 24, 2009, letter, Podsaid requested a hearing on the Board's decision from the June 17, 2009, meeting. (R. 212). In the letter, Podsaid requested copies of all exhibits admitted at the June 17, 2009, meeting. (R. 212). The Board's action was detailed by Mr. Roger Hales, counsel for the Board, in a letter sent to Podsaid on June 24, 2009 (erroneously referenced as "July 14, 2009" in Podsaid's Petition for Judicial Review of Final Order). Mr. Hales' letter also included copies of the Board exhibits and a record of the hearing. R. (213-435).

Podsaid filed a Petition for Judicial Review of Final Order on July 22, 2009. (R. 448-451). There was no Board "order" that was appealed, rather a letter from the Board's attorney. (R. 448-

451). The Board office did not receive a copy of the faxed Petition, nor was it personally served on the Board, or served by mail on the Board or its legal counsel. The Board's enforcement attorney did not receive a copy of the Petition and, therefore, sent Podsaid a letter dated August 31, 2009, discussing the case and informing Podsaid that a notice of hearing would be forthcoming. Podsaid was given notice of a hearing scheduled for September 18, 2009, with an opportunity to present argument before the Board on its denial of his application. (R. 436-438). Rather than attend the hearing that Podsaid requested, he chose to file this appeal.

On September 4, 2009, Podsaid filed a Motion for Stay as to the September 18, 2009, hearing. Also on September 4, 2009, Podsaid filed an Amended Petition for Judicial Review of Final Order, stating that "proper service is being made forthwith upon all parties required to be served pursuant to I.A.R. 20. It has been determined that service of the original petition filed July 23, 2009 did not properly transmit to the parties listed in the certificate of service." The Board filed a Motion to Dismiss Appeal on September 11, 2009. At Podsaid's request, the hearing was rescheduled to December 4, 2009. (R. 640, 644-646). Subsequently, the Board agreed to vacate the hearing and the parties agreed to attempt mediation. The court stayed the action pending mediation.

On May 3, 2011, an Order to Lift Stay and Proceed with Appeal was filed. However, Podsaid failed to proceed with the appeal for nearly a year and then finally filed a Motion to Set Briefing Schedule on Appeal and Notice of Hearing on February 2, 2012. The parties agreed to a hearing date in April 2012 but Petitioner failed to file the appropriate documents with the court to schedule the hearing. On August 14, 2012, the Board filed an Agency Record for Judicial Review, to which Podsaid objected. On September 6, 2012, the Board filed an Amended Agency Record for Judicial Review. On December 31, 2012, an Order Setting Briefing Schedule and Notice of Appeal Hearing was filed.

STANDARD OF REVIEW

"The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code § 67-5279(1). The court shall affirm the agency action unless the court finds "that the agency's findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion."

Idaho Code § 67-5279(3).

ARGUMENT

Podsaid argues that the Board's decision to treat his March 2009 guide license application as a new application was in error. (Opening Brief, p. 13). Podsaid claims that the Board:

... did not initiate a fair and impartial hearing process for a licensee of a continuing license. It is clear from the facts in the record that this irregularity in proceedings was followed to afford the Board the ability to consider the allegations of the contested case and utilize them in its decision without the necessity of [the Board] proving such violations in the contested case.

(Opening Brief, p. 15).

Podsaid states that the Board has "disregarded this Court's stay. To achieve its own objectives, [the Board] decided not to treat a renewal application as such. It has continued to consider the Settlement Agreement in making licensing decisions, even though a case is pending on appeal regarding the appropriateness of this action." (Opening Brief, p. 17).

The real issue here must not be lost among the various irrelevant facts and arguments made by Podsaid. He is appealing a *letter* from the Board's attorney in which the Board's action at the

June 17, 2009, meeting was detailed. The Idaho Administrative Procedure Act provides judicial review of *final agency action* or *final orders in contested cases*. Idaho Code § 67-5270(2), (3). A letter discussing a Board meeting is not a final agency action or final order. As a result, there is no right of review and no basis for appeal.

Even assuming a right to appeal the letter, Podsaid is incorrect in assuming that his 2009 guide license application is a renewal and not a new application. Podsaid's guide license application sought licensure with Scott Boulanger for snowmobiling and hunting. Podsaid's prior guide license (which is at issue in a different appeal) was to guide for Mr. Thorne, who purchased Podsaid's outfitter business. Mr. Thorne did not seek to employ Podsaid as a licensee for 2009-2010. The license Podsaid held (which expired on either December 31, 2008, or March 31, 2009, depending on the court's ruling in the other appeal) did not include guiding for Scott Boulanger, did not include providing guided snowmobiling excursions, and did not include guiding in Mr. Boulanger's operating area. It was clearly a new application.

With respect to Podsaid's argument that the Board improperly relied upon the prior conduct of Podsaid, the issuance of licenses has been delegated to the Board's Executive Director and these licenses are then approved by the Board when approving the consent agenda at an official meeting. Only when concerns of staff, partnering agencies, individual Board members, or the public are brought to the attention of the Executive Director is the Board asked to consider particular licensure. As permitted by IDAPA 25.01.01.064(d), the Executive Director of the Board deferred the decision of whether to issue Podsaid a guide license to the Board.

Idaho Code § 36-2101 makes it clear that the intent of the Legislature is to safeguard the safety, health, welfare, and freedom from injury or danger through the use of licensing and regulation of outfitters and guides. Idaho Code § 36-2108(c) specifically provides that the Board

"in its discretion, may make such additional investigation and inquiry relative to the applicant and his qualifications as it shall deem advisable" A license *must* be refused if the Board finds that the applicant is "not a competent person of good moral character...." Idaho Code § 36-2109(c). A license *may* be refused "for violation of any of the provisions hereinafter specified in this chapter as grounds for revocation or suspension of an outfitter's or guide's license." Idaho Code § 36-2109(c). Further, "[n]o license shall be issued by the board until a majority thereof has reported favorably thereon; except, an application for a license identical to a license held during the previous year may be issued on approval by one (1) board member *providing there is no adverse information on file regarding the applicant.*" Idaho Code § 36-2109(d) (emphasis added). The Board's responsibilities with respect to issuing new licenses are outlined in Idaho Code § 36-2107(a), Idaho Code § 36-2108(c), and Idaho Code § 36-2109(c).

Idaho Code § 36-2107(a) states that the Board has the following duties and powers: "[t]o conduct examinations to ascertain the qualifications of applicants for outfitter's or guide's licenses, and to issue such licenses to qualified applicants, with such restrictions and limitations thereon as the Board may find reasonable."

Idaho Code § 36-2108(c) provides:

The board, in its discretion, may make such additional investigation and inquiry relative to the applicant and his qualifications as it shall deem advisable, provided that final decision by the board upon an application submitted by an applicant who has held during the preceding license year a license of the same kind for which application is made, and upon an application submitted by an applicant not holding during the preceding license year a license of the same kind or embracing the same activity(ies) or area for which application is made, shall be made not later than the end of the license year in which the board receives all materials required to be submitted in order to complete a license application or ninety (90) days from the date the board receives all such materials, whichever is later.

In addition, Idaho Code § 36-2109(c) provides:

The Board shall refuse to issue any license to any applicant for an outfitter's or guide's license who the board finds is not a competent person of good moral character, less than eighteen (18) years of age and does not possess a working knowledge of the game and fishing laws of the state of Idaho and the regulations of the United States Forest Service...The board may also refuse to grant an outfitter's or guide's license to any applicant for violation of any of the provisions hereinafter specified in this chapter as grounds for revocation or suspension of an outfitter's or guide's license. If the application is denied, the board shall notify the applicant, in writing, of the reasons for such denial within ten (10) days and if the applicant shall correct, to the satisfaction of the board, such reasons within thirty (30) days of receipt of such notice and if, thereafter, a majority of the board concur, the board may issue a license to the applicant.

Idaho Code § 36-2109(c).

Podsaid has a long history with the Board as both an outfitter and a guide. When considering Podsaid's 2009 guide license application, the Board was required to follow Idaho Code § 36-2109(c) and to take into account his entire past history. As to the Administrative Complaint regarding advertising matters that Podsaid takes issue with specifically, advertising that is false or misleading jeopardizes the public, so the Board properly considered Podsaid's representations to the public when determining whether to issue a guide license. As stated above, the Board has the basic obligation of protecting the health, safety, and welfare of the public. Based on the applicable law, the Board was required to consider Podsaid's licensing history.

Podsaid also claims that "the Board deliberated in executive session rather than discussing potential litigation as noted on the record before the Board entered into executive session." (Opening Brief, p. 18). Pursuant to Idaho code § 67-2345(f), executive session is permitted "[t]o consider and advise its legal representatives in pending litigation or where there is a general public

awareness of probable litigation." The minutes demonstrate that the Board entered executive session to discuss the "legal ramifications and options concerning pending or likely litigation" (R. 204). Podsaid has no evidence whatsoever that the Board deliberated in executive session. Podsaid was notified of this Board meeting and was permitted to attend and present his argument, but he refused. Now he complains about the meeting when it was his choice not to attend to present any objections he had.

Podsaid also requests an order from the Court requiring the Board use "a third party hearing officer to conduct any future contested case regarding his license" (Opening Brief, p. 20). This request is beyond the scope of appeal. It is the Board's decision whether to hold any "further contested hearings regarding [Podsaid's] license." In addition, the Idaho Administrative Procedure Act provides judicial review of final agency action or final orders in contested cases. Idaho Code § 67-5270(2), (3). An order requiring a certain hearing officer for potential hearings in the future is not a final agency action or a final order in a contested case. As a result, there is no right of review and such an order is not permitted.

Podsaid requests attorney fees pursuant to Idaho Code § 12-117, which states that "the court ... shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law." In *Rincover v. State, Dep't of Fin., Sec. Bureau*, the Department of Finance relied upon specific provisions of a statute that had not yet been interpreted by the courts. *Rincover v. State, Dep't of Fin., Sec. Bureau*, 132 Idaho 547, 550, 976 P.2d 473, 476 (1999). The Idaho Supreme Court found that even though the "district court below disagreed with the Department's interpretation and application" of the statute, the Department's action was not unreasonable. *Id.*

Here, there is no Idaho appellate case interpreting what constitutes a continuing license vs. a new application with respect to outfitter or guide licenses. As discussed above, the Board's position that it acted in accordance with Idaho law by considering Podsaid's guide license application as a new application is a legitimate and valid argument based on the circumstances of this case. Therefore, the Board has not acted without a reasonable basis in fact or law and Podsaid is not entitled to costs and/or attorney's fees.

Because Podsaid has acted without a reasonable basis in fact or law by filing an appeal from a letter and not a final order or other final agency action as required by Idaho law, the Board requests this court award it attorneys' fees pursuant to Idaho Code § 12-117.

CONCLUSION

In light of the above, the Court should uphold the Board's decision to treat Podsaid's 2009 guide license application as a new application.

DATED this 15 day of February, 2013.

MICHAEL KANE & ASSOCIATES, PLLC

BY:



MICHAEL J. KANE
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of February, 2013, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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STATE OF IDAHO
COUNTY OF SHOSHONE/SS
FILED

2013 MAR 29 PM 1:55

PEGGY WHITE
CLERK DIST. COURT
BY *[Signature]*

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

A.T. "SANDY" PODSAID,

Case No. CV-09-440

Petitioner,

REPLY BRIEF

vs.

STATE OF IDAHO OUTFITTERS AND
GUIDES LICENSING BOARD, a state agency,

Respondent.

I. INTRODUCTION

Portions of this brief reiterates arguments raised in the companion appeal of this matter. Apology is made to the Court for this repeat of information; however, it is done for the sake of clarity of the record on appeal and because it prevents the arguments in this appeal from becoming disjointed.

There are two types of licenses issued by the IOGLB. One is an outfitter license. The other is a guide license. Some licensing requirements are the same for each type of license, and some licensing requirements are specific to the designated license. There are more administrative rules that apply to an outfitter's license than a guide's license.

This matter involves an application for a renewal of a guide license of A.T. "Sandy" Podsaid, which included a different employing outfitter. A guide is defined under the agency's Idaho Administrative Procedure Act (IDAPA) rules as "[a]n

REPLY BRIEF: 1

individual who meets the criteria as set forth in Idaho Code 36-2102(c), and has further met the required qualifications as prescribed in the Rules to provide professional guided services to clientele in the pursuit and conduct of licensed activities.” IDAPA 25.01.01.002.18 (4/1/92). A guide license is “[a] license issued by the Board to an individual who is employed by a licensed outfitter to furnish personal services for the conduct of outdoor recreational activities as defined in Idaho Code § 36-2102(c).” IDAPA 25.01.01.002.19 (4/1/92).

As the Court may recall from Podsaid’s opening brief, Podsaid entered in a Settlement Agreement with IOGLB in August 2007. R pp. 166-172. The Settlement Agreement resolved two Administrative Complaints filed by IOGLB against Podsaid. The Settlement Agreement indicated “the parties desired to avoid further controversy and fully settle and compromise any and all claims, charges, actions, causes of action, licensing issues, and disputed issues of law and fact that have been raised or could have been raised by the parties hereto.” R p. 176. Podsaid admitted to two violations contained in Administrative Complaint Case No. 07-2594-04. The remaining alleged counts were dismissed. R p. 177, Clause 4. Podsaid was issued a guide license to guide for Bitterroot Mountain Outfitters through October 1, 2007 and was placed on probation during that time with probationary terms on the guide license outlined in the agreement. R pp. 178-179, Clause 9.

Following this probationary term, Podsaid was issued a guide license April 11, 2008 which expired March 31, 2009. In June 2008, the Board unilaterally changed the expiration date of Podsaid’s guide license to December 31, 2008 by motion at a regular meeting. In the present case, the Executive Director characterized the Board’s action at the June meeting as one where the Board administratively amended Podsaid’s guide

license without requiring a formal motion or form to amend. R p. 15. IOGLB contends the action it took was consistent with the terms of the Settlement Agreement.

No explicit provision of the Settlement Agreement provided for a termination of Podsaid's guide license effective December 31, 2008. An explicit term of the settlement agreement did provide for the termination of Podsaid's outfitter license December 31, 2008. R. p. 180, Clause 12. In January 1, 2009, this Court entered a stay in the companion appeal, Shoshone County Case No. CV 2008-807, staying termination of Podsaid's license effective December 31, 2008. Thus, Podsaid's license remained a valid license with an expiration date of March 31, 2009, which could be renewed.

On a minor note, IOGLB complains that Podsaid did not move forward sooner with this appeal. However, IOGLB did not timely settle the record on appeal as required by I.R.C.P. 84, thus prohibiting Podsaid's ability to move forward with the appeal. The record on appeal was not settled by IOGLB until September 25, 2012. Thereafter, on December 31, 2012, Podsaid submitted an order setting a briefing schedule and setting the matter for hearing. Thus, the failure to proceed in a more timely manner lies at IOGLB's door, not Podsaid's.

II. STATUTES AND ADMINISTRATIVE RULES RELEVANT TO GUIDE LICENSES

To better understand the arguments presented in this matter, it is useful to review the statutes and rules pertaining to a guide's license in effect at the time that Podsaid applied for his license renewal. Overall, the purposes of the Idaho Administrative Procedures Act (IDAPA) rules related to outfitter and guides are "[t]o establish uniform standards for licensing outfitted and guided activities in Idaho in order to protect, enhance, and facilitate management of Idaho's fish, wildlife, and recreational resources." IDAPA 25.01.01.001.02 (3/1/86). The following is a summation of the statutes and

related rules regarding a guide's license, issuance of a guide's license, amendment of a guide's license, revocation or suspension of a guide's license and terms of probation and penalties for violation of IOGLB rules and regulations.

GUIDE LICENSE

- A guide license is valid from the date issued and expires March 31 of the following year. I.C. § 36-2109(a), IDAPA 25.01.01.015.01.c (03/20/04).
- A guide license issued by the Board shall specify all activities for which a guide is qualified to guide and shall indicate the outfitter(s) who signed the guide license application as the employing outfitter(s); and identify such limitation(s) or qualification(s) as may be imposed by the Board in issuance of said license. IDAPA 25.01.01.007 (10/15/88).
- To be licensed, a guide must be employed by a licensed outfitter and his guiding privileges are restricted to the outfitter's operating areas. IDAPA 25.01.01.032 (10/15/88);
- A guide must meet all general requirements for a guide, and any specific requirements unique to his specialized field and any other requirements that appear on the application. IDAPA 25.01.01.033 (3/1/86).

GUIDE'S APPLICATION OBLIGATIONS

- A guide license may be submitted at any time during the year. IDAPA 25.0.01.015.d (3/20/04);
- The guide must submit an application on the form provided by the board. I.C. § 36-2108(a), IDAPA 25.01.01.013 (10/3/73).
- The application must be signed by the applicant. I.C. § 36-2108(a)(2);
- The application must be endorsed by the outfitter(s) by whom the applicant will be employed. I.C. § 36-2108(a)(2).
- If the application is not complete, the guide must pay a resubmittal fee. IDAPA 25.01.01.015.07 (3/16/04).

GUIDE LICENSE AMENDMENT

- Once the guide licensing fee is paid, the guide license can be amended to include more than one (1) outfitter. IDAPA 25.01.01.015.05.d (4-11-06);
- The amendment is processed on an amendment request form promulgated by the Board. IDAPA 25.065.02 (4/5/00).

GUIDE'S FINANCIAL OBLIGATION IN ALL LICENSING PROCESSES

- ### BOARD'S RESPONSIBILITIES IN LICENSING PROCESS

BOARD'S RESPONSIBILITIES IN LICENSING PROCESS

- revocation or suspension of a guide's license. I.C. § 36-2109(c). Provided however, the Board may grant a license to an applicant with convictions of violations enumerated in I.C. § 36-2113(a) which are less than or over five (5) years old and may or may not place the licensee on probation. IDAPA

25.01.01.064.02.a and b (3-30-01). (The grounds for revocation under I.C. § 36-2113(a) are enumerated in the revocation section below.)

- The Board may require a guide applicant **who has never held a guide license** and who has been convicted of a violation of local, state, or federal law to appear before the Board. IDAPA 25.01.01.010.01 (3-1-86). (Emphasis added.)
- If the application is denied, the board shall notify the applicant, in writing, of the reasons for such denial within ten (10) days and if the applicant shall correct, to the satisfaction of the board, such reasons within thirty (30) days of receipt of such notice and if, thereafter, a majority of the board concur, the board may issue a license to the applicant. I.C. § 36-2109(c).
- When a guide license holder is convicted of a violation of local, state, or federal law, the Board will examine the nature of the violation and the circumstances in determining whether or not a hearing shall be held for the purpose of restricting, suspending or revoking the guide license or imposing an administrative fine for any violation. **Any such violator may be required to appear before the Board before a license will be issued for the following year.** IDAPA 25.01.01.010.03 (3-1-86). (Emphasis added.)

GUIDE LICENSE REVOCATION

- Every guide license shall be subject to suspension, revocation, probation or other restriction by the board for the commission of any of the following acts:
 1. For supplying false information or for failure to provide information required to be furnished by the license application form for a license currently valid or for other fraud or deception in procuring a license under the provisions of this chapter.
 2. **For fraudulent, untruthful or misleading advertising.** (Emphasis added.)
 3. For conviction of a felony.
 4. For two (2) or more forfeitures of any deposits of money or collateral with a court or administrative agency or for a conviction for violation of regulations of the United States forest service or the bureau of land management.
 5. For unethical or unprofessional conduct as defined by rules of the board.
 6. For conviction of any violation of any state or federal fish and game or outfitting and guiding laws.
 7. For a substantial breach of any contract with any person utilizing his services.
 8. For willfully (i) operating in any area for which the licensee is not licensed, or (ii) engaging in any activity for which the licensee is not licensed.
 9. For the employment of an unlicensed guide by an outfitter.
 10. For inhumane treatment of any animal used by the licensed outfitter or guide in the conduct of his business which endangers the health or safety of any guest or patron or which interferes with the conduct of his business.
 11. For failure by any firm, partnership, corporation or other organization or any combination thereof licensed as an outfitter to have at least one (1)

licensed outfitter as designated agent conducting its outfitting business who meets all of the qualifications and requirements of a licensed outfitter.

12. For the failure to provide any animal used by the licensed outfitter or guide in the conduct of his business with proper food, drink and shelter, or for the subjection of any such animal to needless abuse or cruel and inhumane treatment.
13. For failure of an outfitter to serve the public in any of the following ways:
(i) by nonuse of license privileges as defined by rules of the board, (ii) by limiting services to any individual, group, corporation or club that limits its services to a membership, or (iii) by not offering services to the general public.
14. For violation of or noncompliance with any applicable provision of this chapter, or for violation of any lawful rule or order of the outfitters and guides board.

I.C. § 36-2113(a).

- Proceedings for the revocation or suspension of a guide license may be taken upon information and recommendation of any person.
 - 1 All accusations must be made in writing and signed by a person familiar therewith and submitted to the board.
 2. The board, acting as a board, or through its executive director, shall make a preliminary investigation of all facts in connection with such charge.
 3. The board in its discretion may either decide to take no further action and the results of such investigation shall be subject to disclosure according to chapter 3, title 9, Idaho Code, or the board may decide to initiate proceedings to suspend or revoke the license of the outfitter or guide against whom a complaint has been filed, in which case **the board shall set a time and place for hearing** as provided in chapter 52, title 67, Idaho Code. (Emphasis added.)
 4. Notice of such hearing shall be given to the licensee against whom a citation or formal complaint has been filed not later than one hundred eighty (180) days after the filing of such citation or formal complaint.
 5. If, after full, fair and impartial hearing, the majority of the board shall find the accused has committed the violations alleged, the board may suspend the license for a period not to exceed one (1) year, or the board may order the license revoked. The board shall forthwith suspend or revoke such license in accordance with and pursuant to its order under the procedure established in chapter 52, title 67, Idaho Code.

I.C. § 36-2114.

GUIDE PROBATION & PENALTIES

- In addition to suspension, probation, restriction or revocation of a license, the Board may impose penalties as set forth in an adopted schedule. IDAPA 25.01.01.068.01 (3/30/2001).
- The standard or usual terms of probation are that there be no violations of local, state or federal laws or ordinances, and that no amendments to the license will be permitted during the term of probation. Probation may also

include such other restrictions as the Board shall order. IDAPA 25.01.01.068.03 (3/23/98).

GUIDE APPEAL RIGHTS

- Any person aggrieved by any action of the board in denying the issuance of or in the suspension or revocation of a guide's license may proceed as provided in chapter 52, title 67, Idaho Code. I.C. § 36-2115.
- An agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of title 67, chapter 52. I.C. § 67-5254(1).
- When a licensee makes timely and sufficient application for the renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and in the case of denial or limitation of the new license, until the time to appeal has expired. I.C. 67-5254(2).

III. ARGUMENT

A. IOGLB Improperly Treated Podsaid as a New Applicant Instead of a Renewing Licensee

In the present case, Podsaid twice applied for a license renewal utilizing form OG-4 promulgated by IOGLB. R. pp. 1-6. The Executive Director informed Podsaid he was exercising his right to defer the renewal application to the Board. R p. 7.¹ The Executive Director then scheduled a hearing for June 17, 2009. R p. 7. The notice indicated the reason for the hearing was “for the purpose of conducting examination to ascertain the qualifications of Applicant [Podsaid] for a guide license, which application has been submitted by outfitter Mr. Scott Boulanger.” In point of fact, the license application was endorsed by Scott Boulanger as the outfitter by whom Podsaid would be employed during the upcoming licensing year in compliance with the requirements of I.C. § 36-2108(a)(2).

¹ In fact, the Executive Director did not have authority to grant Podsaid's license renewal pursuant to IDAPA 25.01.01.064.01.a.

On appeal, IOGLB contends that it received an amended renewal application from Podsaid on March 30, 2009. This statement is not correct. Podsaid resubmitted his renewal application on March 30, 2009. His original renewal application was submitted in January 2009 as set forth in the opening brief statement of facts.

IOGLB points to the fact that this license renewal was for a different outfitter, different activities (snowmobiling was included) and a different operating area as the reason it treat Podsaid as a first time applicant. There are no facts in the record to support this statement of fact. However, assuming they are true, nothing about these facts justify the actions taken by the Board. As indicated in the authority provided above, a licensed guide may seek an amendment of his guide license. He may change employing outfitters. It is not anticipated that his renewal application will be identical each year, but if it is, then only one board member's approval is needed for the renewal. The only requirement is that the guide use the renewal application form provided by IOGLB. Nothing prohibited Podsaid from seeking a renewal of his guide license with a new outfitter and additional guide activities. Certainly nothing in the statute or the administrative rules allowed the Board to treat a renewal application properly submitted on its own form as an excuse to revoke an existing license or treat the application as a first time application as argued by IOGLB.

B. Podsaid's Appeal was Proper Under the Facts and Circumstances

IOGLB points out that it provided Podsaid with the Executive Director's "Analysis" of his renewal application approximately six weeks before the hearing. Interestingly enough, IOGLB provides no reference to the authority under which this "Analysis" was prepared. Following issuance of the notice of hearing and analysis, Podsaid's counsel objected to the process being utilized by IOGLB to determine whether

to renew Podsaid's license. Podsaid's counsel informed IOGLB's staff attorney that Podsaid objected to the process on several grounds, including IOGLB's decisions to: (1) ignore Podsaid's status as a renewing applicant, and instead treat Podsaid as a first time applicant because different procedures applied based upon the applicant's status; (2) process the applications without following the provisions of I.C. § 67-5254; (3) treat the change in the employing outfitter in the renewal application as a grounds to deem Podsaid as a first time applicant; (4) scheduling a hearing to "examine" Podsaid as a guide under the standards applied to a first time guide applicant; and (5) attempting to adjudicate contested Administrative Complaint 09-2594-01 in the "applicant examination" of Podsaid as a first time applicant. Nonetheless, Podsaid's objections were ignored and the Board proceeded to conduct an "applicant examination hearing".

IOGLB's analysis of why it could treat Podsaid as a first time applicant was fundamentally flawed. The Executive Director urged the Board to consider the license to have terminated December 31, 2008 (R p. 14) despite the specific order of this Court staying such termination. The Executive Director argued to the Board that it was not the intent of the Board to extend Podsaid's licensing privileges beyond December 31, 2008, despite the lack of such a term in the Settlement Agreement, and despite the fact that this position was contradicted by the agency's own action, i.e. the issuance by the agency of a license following his probationary period commencing April 11, 2008 with an expiration date of March 31, 2009. The Executive Director informed the Board it had "administratively amended" Podsaid's guide license without formal motion or form, and therefore Podsaid's application was not a renewal and Podsaid held the status of a first time applicant. R. p. 15. The Executive Director indicated that the renewal application

listed a different outfitter, and therefore it did not constitute a renewal application, but rather was treated as a first time application. R p. 17.

As noted in the relevant statutes and administrative code section above, a guide may amend his license to allow for a different employing outfitter. Also, the statutes do not anticipate that a renewal application will be identical to the previous year, but if it is, then only one board member's approval for renewal is required. I.C. § 36-2109(d).

It is clear that the intent behind the determination to treat Podsaid as a first time applicant was to deny Podsaid the process he was due as a licensee submitting a renewal application. Further, it is clear that the Board specifically ignored this Court's stay of the revocation of Podsaid's license effective December 31, 2009, and ignored his status as renewing licensee and treated him as a first time guide license applicant.

IOGLB's determination to treat Podsaid as a first time guide license applicant was critical to the process that would be used in processing his renewal application and the rights Podsaid had to review of such processes. A new applicant is not afforded the due process protections of I.C. § 67-5254, and the opportunity for a contested case as set forth therein for a renewing applicant. As pointed out in Podsaid's opening brief, IOGLB was fully aware of this fact as their prosecuting attorney explained this exact fact to the Board at the "qualification examination" conducted in this matter.

A first time applicant is subject to different licensing processing procedures than a renewing applicant. Idaho Code allows the Board to conduct such additional investigation and inquiry relative to the guide applicant and his qualifications as it shall deem advisable in the exercise of its discretion. The administrative rules promulgated there under allows the Board to require a guide applicant **who has never held a guide license** and who has been convicted of a violation of local, state, or federal law to appear

before the Board. IDAPA 25.01.01.010.01 (3-1-86). Further, all new applicants applying for an outfitter or designated agent license will be required to take a written and/or oral examination on the Act, the administrative rules, and general outfitting procedures. IDAPA 25.01.01.020 (3/1/86). However, there is no provision in the administrative rules that allows the Board to set a hearing for the purpose of an “examination” of a renewing guide to ascertain his qualifications to be a guide. It is clear from the transcript of the hearing that this procedure was utilized by the Board to conduct a hearing on the matters set forth in its Administrative Complaint without being required to afford Podsaid the procedural due process protections and procedures required in a contested case.

At some point, the Executive Director prepared an “Analysis and Recommendation for Board Agenda Items.” This analysis illustrated that Podsaid’s grave concerns regarding the process being utilized were justified. The Executive Director informed the Board that it had a right to ignore this Court’s stay on the revocation of Podsaid’s license effective December 31, 2008 and treat him as a first time applicant. R pp. 11-19. The Board was guided away from utilizing the procedures outlined in I.C. §67-5254 for a renewing licensee.

It is also clear that another reason that the Executive Director wanted the Board to review Podsaid as a new licensee was to revive matters which were resolved in the Settlement Agreement and further punish Podsaid. Under IDAPA 25.01.01.010.03, when there is a violation, the violator may be required to appear before the Board before a license will be issued for the following year. Podsaid had appeared before the Board on the matters raised by the Executive Director in his analysis, and the matters were resolved in the Settlement Agreement reached between the parties, as recognized by the language in the Settlement Agreement, which stated that “the parties desire to avoid further

controversy and fully settle and compromise any and all claims, charges, actions, causes of action, licensing issues, and disputed issues of law and fact that have been raised or could have been raised by the parties hereto.” R p. 176. Podsaid paid substantial amounts of money in relation to the Settlement Agreement. He suffered substantial consequences with respect to his outfitter license. He was placed on a probationary period with respect to his guide license based upon the Settlement Agreement. Nonetheless, the Executive Director commenced his analysis of Podsaid as a “new applicant” with a lengthy discussion of Podsaid’s disciplinary history raising all of these resolved issues, informing the Board it was required to consider these issues in conjunction with Podsaid’s renewal application because Podsaid had applied for a “new” license, and seeking further punishment in the form of a license denial. This action violated the Settlement Agreement and was a breach of the covenant of good faith and fair dealing. Further, the Board had already taken disciplinary action on these matters, and it was inappropriate to try and bring Podsaid before the Board again on them when he had already appeared on these disciplinary matters and been punished for those violations which were admitted.

In the section entitled Analysis, the Executive Director argued that I.C. § 36-2109(c) required the Board to deny a license to anyone that it determined was “not a competent person of good moral character.” IOGLB takes this same position on appeal. However, this analysis is incorrect. This section of code requires the board to refuse a guide license to an applicant who the board finds is not a competent person of good moral character, less than eighteen (18) years of age and does not possess a working knowledge of the game and fishing laws of the state of Idaho and the regulations of the United States forest service. This section of code is phrased in the conjunctive, not the disjunctive.

Podsaid is over eighteen (18) years of age. Thus, this section was inapplicable to his license renewal application. Nonetheless, the Executive Director advised the Board it was required to deny Podsaid's license application under Idaho law.

Further, the Executive Director asked the Board to consider dismissed counts that Podsaid violated advertising rules filed against Podsaid in 2007 which were dismissed as part of the 2007 Settlement Agreement. The Executive Director's requested that Podsaid be subjected to ongoing licensing penalties for these resolved and dismissed counts. Even more egregious, the Executive Director's requested that the Board "inquire" into alleged violations of the Board's advertising rules that were the subject of a contested case filed as Administrative Complaint 09-2594-03 filed February 9, 2009. The Executive Director included the Complaint and the Answer, but not the Motion to Dismiss filed in the matter. This alleged violation was the only new matter that existed between the disciplinary matters resulting in the 2007 Settlement Agreement and Podsaid's most recent guide license renewal and the current request for a guide license renewal.

IOGLB does not address the issue of the Administrative Complaint on appeal. The Administrative Complaint remains unadjudicated to this day even though Podsaid answered it and moved to dismiss it for a failure by the agency to follow its own rules in bringing the complaint forward. Idaho Code § 36-2114 is clear that once the board decides to initiate proceedings to suspend or revoke the license of a guide that it **shall** set a time and place for hearing as provided in chapter 52, title 67. IOGLB has refused to comply with this mandate. The record before this Court demonstrates IOGLB intended to ambush Podsaid at the "examination" hearing by adjudicating this complaint. It is

equally clear that IOGLB intended to skirt the requirements set out by statute regarding the administrative complaint.

Although the hearing was allegedly to conduct an applicant examination, Mike Kane, an Enforcement Attorney for the department, was present and the “qualification examination” to present evidence to the Board to support a conviction of Podsaid on the allegations contained in the Administrative Complaint. It is perfectly clear from the record on appeal that the intent of this guide license qualification “examination” hearing was actually intended to be a resolution of the contested case without affording Podsaid the rights to which he was entitled in a contested case, and without complying with the requirements of title 67, chapter 52 as required. Since this matter was the only new issue before the Board since entering into the Settlement Agreement with Podsaid and issuing his guide license, a reasonable inference is that it was the presentation of evidence on this unadjudicated complaint that swayed the Board into denying Podsaid’s “first time” application.

Even though these substantial procedural irregularities exist, IOGLB maintains that Podsaid was not entitled to appeal its actions. IOGLB points out that Podsaid did not participate in his “examination to ascertain qualifications” and requested reconsideration, which has not occurred.

Podsaid appealed after obtaining the agency record. It was clear that the agency had made a decision to treat Podsaid as a first time applicant and ignore his status as a renewing licensee. It was also clear that the agency had determined to utilize the licensee qualification hearing to adjudicate the pending Administrative Complaint under the guise of a qualifications examination.

The Board points out that these contested actions were not a final order of the agency.² However, a person aggrieved by an agency action other than an order in a contested case is entitled to petition for judicial review. I.C. § 67-5270(2). *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 872, 243 P.3d 1055, 1060 (2010). Podsaid was aggrieved by: (1) IOGLB's decision to disregard this Court's stay on the termination of his license; (2) IOGLB's treating Podsaid as a first time licensee because of a change in employing outfitters, which is allowed under the administrative rules; (3) IOGLB's decision to consider matters resolved in the Settlement Agreement as factors in renewing his license; and (4) IOGLB's use of an applicant "qualification hearing" to adjudicate an Administrative Complaint without affording Podsaid the procedures guaranteed in a contested case, including but not limited to those procedures set forth in I.C. § 67-5242 and the rules for a contested case set forth in IDAPA 4.11.01, Idaho Rules of Administrative Procedures of the Attorney General

Further, a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy. I.C. § 67-5271(2). Podsaid's appeal focuses upon the above enumerated grievances. A review of the Board's denial of his licensing application would not provide an adequate remedy to any of these grievances. Thus, the appeal was appropriate.

D. The Agency's Actions Violate Podsaid's Due Process Rights

Finally, Podsaid's due process rights have been trampled by IOGLB. Due process requires an opportunity upon reasonable notice for a fair hearing before an impartial

² IOGLB correctly notes that the caption of "Appeal of Final Agency Order" is not correct on Podsaid's appeal pleading. More accurately, it should state "Appeal of Agency Action".

tribunal. *Miller v. St. Alphonsus Reg'l Med. Ctr., Inc.*, 139 Idaho 825, 835, 87 P.3d 934, 944 (2004). An agency that is deviating from its own rules is not acting impartially, and is not seeking to provide a fair process to a licensee. An agency that is devising processes to avoid proceeding on a disputed contested case in which significant failures of the agency to abide by its rules have been raised in a motion to dismiss is not acting impartially, is not seeking a fair hearing, and is actively engaged in denying Podsaid due process. An agency that is ignoring a Court's stay of a license revocation to avoid acknowledgment that a license application is a renewal is not acting impartially or affording due process. An agency that creates a "qualification examination" not authorized by its own administrative rules to dodge a contested case on the merits of a matter is not acting impartially or affording the applicant due process. Yet all of these things have occurred in the present matter. Podsaid has been railroaded, denied his opportunity to collect evidence before hearing in a contested case, denied his opportunity to cross examine his accusers in a contested case, denied his right to an impartial tribunal, and denied his opportunity to a meaningful hearing in a contested case. In its zeal to punish Podsaid for allegedly violating the agency's advertising rules, IOGLB failed to follow its own directive to establish uniform standards for licensing outfitted and guided activities in Idaho. It subjected Podsaid to procedures not applied to any other renewing guide licensee. It devised a scheme to have an enforcement attorney for the agency present a contested case to the Board without following the contested case processes which afford and assure due process to an accused.

IOGLB justifies its actions as being done to meet the intent of the legislature to safeguard the public's safety, health, welfare and freedom from injury or danger through the use of licensing and regulation of outfitters and guides. IOGLB ignores the first half

of this administrative rule, which was to establish uniform standards for licensing outfitted and guided activities. In this matter, IOGLB failed to follow any of the uniform standards established in its rules and statutes in handling Podsaid's license renewal.

E. IOGLB Violated Open Meeting Laws

IOGLB claims there is no evidence before this court that the Board improperly utilized executive session for deliberations on Podsaid's license. The facts in the record prove this argument to be false. The transcript of the hearing concludes at the end of the presentation of evidence by the Enforcement Attorney. No deliberation on the license is contained in the record. The Board minutes reflect that immediately following the close of the presentation of the Enforcement Attorneys evidence to the Board to support its allegations that Podsaid advertised in violation of the Board's rules, the subject of the Administrative Complaint, the Board convened into executive session at 2:20 p.m. pursuant to I.C. § 67-2345(1)(f) to discuss legal ramifications and options concerning pending or likely litigation with Board attorney Roger Hales. The executive session ended at 3:05 p.m., and indicated no decision was made in executive session. The hearing transcript demonstrates no deliberation followed executive session, which leads to the inference that any discussion occurred outside the public hearing. The minutes reflect a motion was made immediately upon leaving executive session to grant Podsaid's application with restriction, which motion failed to pass. The minutes reflect another motion was made to deny the guide application based upon Podsaid's misleading advertising in violation of the Board's laws and rules as established by the record of the hearing before the board and based upon his prior discipline by the Board and based upon the settlement agreement dated August 10, 2007. R., pp. 204-205. This motion passed. Thus, the record reflects that the Board tried the Administrative Complaint at this hearing

without following the contested case rules and denied Podsaid's license on that basis. It also reflects that once again, this Board failed to deliberate in public under the guise of discussing pending litigation in executive session. The sequence of events and the lack of one iota of deliberation in the public record leads to only one conclusion: the Board conducted its deliberations in executive session in violation of the open meeting laws.

F. The Court may Require an Impartial Hearing Officer on Remand

IOGLB also contends that this court is without authority to require that an impartial hearing officer hear this matter on remand if a new hearing is ordered. IOGLB contends the Court does not have this authority because IOGLB might decide not to hold any hearings on remand. In the event this Court orders a new hearing on remand, Podsaid is entitled to an impartial hearing officer. *See Johnson v. Bonner Cty. Sch. Dist. No. 82*, 126 Idaho 490, 887 P.2d 35 (1994) (holding that requiring a litigant to submit to a biased decision maker to be a "constitutionally unacceptable" violation of due process.)

IV. ATTORNEY FEES

Regarding attorney fees, IOGLB reiterates its argument from the companion appeal. Podsaid does the same herein with an additional argument directed to the specifics of this appeal.

The most recent version of Idaho Code § 12-117 provides:

12-117. Attorney's fees, witness fees and expenses awarded in certain instances. (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

(2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the

case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

IOGLB is a state agency. Podsaid requested attorney fees be awarded to him on appeal. IOGLB contends that because there is no case law that determines that a guide license is a license of a continuing nature as defined by I.C. § 67-5254 that it did not act without a reasonable basis in law. This argument is specious.

Idaho Code § 67-5254 addresses licenses, which are defined to be any agency permit, certificate, approval, registration, charter, or similar form of authorization required by law, but does not include a license required solely for revenue purposes. I.C. § 67-5201(10). A guide license fits this definition. Idaho Code § 67-5254(1) indicates the license must be one of a continuing nature and discusses license renewals. Further clarification is given in I.C. § 67-5254(2), which notes that when a licensee has made timely and sufficient application for the renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency. Thus it is clear that the statute is focused upon the licensee's licensed activity, which will continue if the license is renewed, thus making it a license of a continuing nature.

However, even if IOGLB is correct that there may be a question regarding the nature of a guide license, its own statutes required it to comply with certain provisions, including those set forth in Title 36, chapter 21.

IOGLB claims it did not act without a basis in fact or law given the language of the Settlement Agreement. This argument lacks merit. While IOGLB may have considered the Settlement Agreement to encompass the guide license, and it may have considered its issuance of a license with an expiration of date of March 31, 2009 to be in

error, its own statutes established procedures for it to follow before revoking Podsaid's guide license as enumerated previously in this brief. I.C. § 32-2114. The Board was required to receive a written recommendation familiar with the facts seeking the revocation. The Board was required to make a preliminary investigation of all facts in connection with such charge. If the Board determined to move forward with the revocation process, it was required to initiate proceedings to suspend or revoke the guide license, and set a time and place for hearing as provided in chapter 52, title 67, Idaho Code. The Board was required to provide Podsaid notice of such hearing. Podsaid was entitled to a full, fair and impartial hearing, before his license was revoked. The board was required to provide it by reference to the procedures contained in chapter 52, title 67, Idaho Code. None of this happened.

Instead, the Board merely made a motion at a Board hearing to revoke the guide license. Thereafter, when its procedural faux pas was called to its attention, it proceeded on a motion to reconsider and did not correct its errors. Instead, it compounded the error by holding illegal executive sessions and refusing to afford Podsaid the process he was due under the law. Clearly, the Board proceeded without a basis in fact or law in this matter. Podsaid is entitled to attorney fees.


Further, given the Court's stay of the revocation of Podsaid's license in this matter, it was not reasonable for the Board to proceed as though Podsaid's license were terminated. IOGLB knew the risk it took in proceeding in this manner. Thus, it did not act with a reasonable basis in law or fact in proceeding as though the license had been terminated.

Finally, IOGLB was well aware that it had the obligation to follow the contested case proceedings with respect to its Administrative Complaint against Podsaid. It was

also aware that its enforcement attorney was presenting the case in a proceeding that did not meet the requirements of a contested case. It certainly knew it was taking action based upon these alleged facts. Therefore, it was aware it was violating Podsaid's due process rights. Under such facts circumstances, attorney fees are merited.

DATED this 29th day of March, 2013.

JAMES, VERNON & WEEKS, P.A.


SUSAN P. WEEKS
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of March, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Michael Kane
Michael Kane & Associates, PLLC
P.O. Box 865
Boise, ID 83701-2865

<input type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input checked="" type="checkbox"/>	Telecopy (FAX) (208) 342-2323

